Supreme Court, U.S.
FILED
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No.

In The
Supreme Court of the United States

ALEKSANDR J. STOYANOV and
YURI J. STOYANOV,
Petitioners

v.

DEPARTMENT OF THE NAVY and
MERIT SYSTEMS PROTECTION BOARD,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Aleksandr J. Stoyanov,
Yuri J. Stoyanov
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QUESTIONS PRESENTED FOR REVIEW

Petitioners seek review of an important question of federal law interpreting jurisdiction of the Whistleblower Protection Act (WPA), which the Court of Appeals for the Federal Circuit narrowly construed in its decisions in conflict with the relevant decisions of other courts and this Court's interpretation of the remedial legislation. The decisions and orders of the Merit Systems Protection Board (MSPB) dismissing Individual Right of Action (IRA) appeals present the following questions:

1. Whether antiretaliation nature of the WPA encompasses retaliatory acts taken against a family member as the acts taken against a person himself?

2. Whether IRA appeal filed with the MSPB pursuant to WPA antiretaliation provision satisfy MSPB jurisdiction on the basis of causal connection between the Whistleblowing activity and prohibited personnel practice against a family member as alleged to the U.S. Office of Special Counsel (OSC) and pleaded in the appeal to the MSPB?

3. Whether asserted nonfrivolous claims of retaliations are sufficient to establish the MSPB's jurisdiction in IRA appeal?

LIST OF PARTIES

YURI J. STOYANOV and
ALEKSANDR J. STOYANOV,
Petitioners,

v.

MERIT SYSTEMS PROTECTION BOARD, and
DEPARTMENT OF THE NAVY,
Respondents.

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1. U.S. Court of Appeals for the Federal Circuit, Docket Nos. 2006-3358, -3359, Order denying Y. Stoyanov's petition for rehearing and rehearing en banc, April 16, 2007. (Appendix p. A1)

2. U.S. Court of Appeals for the Federal Circuit, Docket No. 2006-3363, Order denying A. Stoyanov's petition for rehearing and rehearing en banc, April 13, 2007. (Appendix p. A2)

3. U.S. Court of Appeals for the Federal Circuit, Docket Nos. 2006-3358, -3359, Opinion affirming Board's decision dismissing Y. Stoyanov's IRA appeal for lack of jurisdiction, February 12, 2007. (Appendix p. A2)

4. U.S. Court of Appeals for the Federal Circuit, Docket No. 2006-3363 Opinion affirming Board's decision dismissing A. Stoyanov's IRA appeal for lack of jurisdiction, January 26, 2007. (Appendix p. A10)

5. U.S. Merit Systems Protection Board, Final Order, DC-513D-06-0228-I-1 (for Y. Stoyanov) August 3, 2006. (Appendix p. A20)

6. U.S. Merit Systems Protection Board, Final Order, DC 1221-06-0266W-1 (for A. Stoyanov) August 2, 2006. (Appendix p. A22)

7. U.S. Merit Systems Protection Board, Final Order, DC 1221-06-0160W-1 (for Y. Stoyanov) July 27, 2006. (Appendix p. A18)

8. U.S. Merit Systems Protection Board, Initial Decision, DC 1221-06-0266W-1 (for A. Stoyanov) March 30, 2006. (Appendix p. A35)

9. U.S. Merit Systems Protection Board, Initial Decision, DC-513D-06-0228-I-1 (for Y. Stoyanov) March 22, 2006. (Appendix p. A30)

10. U.S. Merit Systems Protection Board, Initial Decision, DC 1221-06-0160W-1 (for Y. Stoyanov) March 10, 2006. (Appendix p. A24)

JURISDICTION

The U.S. Court of Appeals for the Federal Circuit issued Orders denying timely petitions for rehearing and rehearing en banc on April 16, 2007 for Petitioner Yuri Stoyanov and on April 13, 2007 for Petitioner Aleksandr Stoyanov. Petitioners join in a petition for a writ of certiorari under this Court's Rule 12.4. The Supreme Court has jurisdiction in exercising its power of review of this matter pursuant to 28 U.S.C. 1253-1254. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTES INVOLVED IN THIS CASE

5 U.S.C. §2302 (b)(8) and 5 U.S.C. §1221(a).

STATEMENT OF THE CASE

Petitioners Dr. Yuri Stoyanov and Dr. Aleksandr Stoyanov submit for the Court's consideration and decision an important question of federal law that the MSPB and Court of Appeals for Federal Circuit narrowly construed in conflict with the recent similar decisions of this Court and decisions of other United States courts of appeals on the same important matter that has not been, but should be, settled by this Court's interpretation. It is well established that the Whistleblower Protection Act (WPA) is a remedial legislation and should be "interpreted liberally, to embrace all cases fairly within their scope, so as ... to effectuate the purpose of the statute[s] ...." 82 C.J.S. *Statutes*, § 377 (1999). In addition, Congress expected the WPA to be interpreted broadly to promote the reporting and disclosures by the federal employees, former employees, or applicants for employment. See e.g., *Huffman v. Office of Personnel Management,* 23 F.3d 1342, 1350, (Fed. Cir. 2001). The MSPB decisions, however, involved clearly erroneous interpretations of the remedial legislation authorizing the filing of IRA appeals by concluding that it did not have jurisdiction to adjudicate Petitioners' IRA appeals. The Petitioners have asserted nonfrivolous claims for relief in

IRA appeals within the Board's jurisdiction in accordance with the appeals court's own decisions in other cases. Facts presented below support Petitioners' cause because:

1) Both Petitioners Dr. Yuri Stoyanov and Dr. Aleksandr Stoyanov have worked for the Navy as career appointment Scientists since 1989. In February 2002, both Petitioners filed first EEO discrimination complaints. Since February 2002, agency officials escalated discrimination and retaliations against both Petitioners for participation in EEO discrimination complaint activities and Whistleblowing; One month after filing the first EEO complaint the agency officials retaliated and transferred Dr. Yuri Stoyanov to another technology department involuntarily from the department where he worked for over fifteen years. Petitioners filed additional EEO discrimination complaints and reported violations of laws through the chain of Navy command and to US Office of Special Counsel (OSC). In September 2003, the EEOC Administrative Judge found that the agency officials committed intentional discrimination against the Petitioner Dr. Aleksandr Stoyanov in reprisal for prior EEO activity. See Complaints to OSC, Appeals to MSPB; Informal Brief of Petitioner to the US Court of Appeals for Federal Circuit.

2) Navy officials retaliated again, failed to implement the Navy policy of zero tolerance to discrimination, and unlawfully removed the Petitioner Dr. Aleksandr Stoyanov from the Scientist position in October 2003. Removal is pending adjudication in U.S. District Court and "in the eyes of the law" the Petitioner remains in service; See *Dilley v. Alexander, 627 F.2d 407, 411 (1980)*; Informal Brief of Petitioner to US Court of Appeals for Federal Circuit.

3) As a result of agency's failure to comply with laws and the Navy policy, agency officials escalated discrimination and retaliations against the Petitioner's twin brother Dr. Yuri Stoyanov for participation in Whistleblowing and EEO discrimination complaint activities. In 2004, the EEOC Administrative Judge again found that the

agency officials discriminated against the Petitioner in another EEOC discrimination case. On March 29, 2005, the EEO Commission Office of Federal Operations (EEOC-OFO) upheld found discrimination against the Petitioner in the first case and ordered the agency to take appropriate disciplinary action against the responsible management officials. However, agency officials again failed to implement the Navy policy of zero tolerance to discrimination and the EEOC-OFO Order to take appropriate disciplinary action against the responsible management officials, and instead escalated retaliations against Dr. Yuri Stoyanov.

4) On August 9, 2005, the Petitioner (Dr. A. Stoyanov) informed Head of the Navy's Carderock Division Captain Behrle about failure to implement the EEOC-OFO Order and respectfully requested compliance with the Navy policy and the EEOC-OFO Order. However, Captain Behrle failed to respond or take any remedial measures to implement the Navy policy and the EEOC Order.

5) On August 29, 2005, and in the morning of September 7, 2005, A. Stoyanov faxed appeal to Admiral Macy as the next level in the chain of Navy command to implement the EEOC Order and the Navy policy. In the afternoon on September 7, 2005, management officials retaliated against his twin brother Dr. Yuri Stoyanov and threatened to suspend him from work.

6) On September 8, 2005, Petitioner Dr. Yuri Stoyanov also appealed to Admiral Macy to take remedial measures to rescind proposed suspension and end violations of laws, unlawful discrimination, and retaliations. In September 2005, Petitioner Dr. Yuri Stoyanov filed complaint with the U.S. Office of Special Counsel (OSC) and disclosed violations through the chain of the Navy command.

7) In retaliation, agency officials escalated discrimination against Dr. Yuri Stoyanov and issued false performance evaluation on November 1, 2005, on November 14, 2005 denied within-grade promotion, and on November

22 issued a Letter of Reprimand and imposed discriminatory restrictions.

8) Both Petitioners exhausted administrative remedies before the OSC. On October 26, 2005 and December 20, 2005, OSC informed Dr. Yuri Stoyanov and Dr. Aleksandr Stoyanov of a right to seek corrective actions from the Merit Systems Protection Board (MSPB), respectively.

9) On December 9, 2005, Dr. Yuri Stoyanov filed appeal with MSPB. On December 14, 2005, MSPB informed Dr. Yuri Stoyanov that the claim of denial within grade increase was rejected because appeal was filed too early. On December 29, 2005, Dr. Yuri Stoyanov filed another complaint with the OSC and included prohibited personnel actions of intentionally false evaluation of performance, denial of within grade promotion, and issue of Letter of Reprimand in retaliation for Whistleblowing activities. On January 29, 2005, OSC informed Dr. Yuri Stoyanov of a right to seek corrective actions from MSPB.

10) On January 24 and on February 1, 2006, MSPB Administrative Judge issued Order to Show Cause and file evidence and argument to prove that appeals to the MSPB filed by each Petitioner were within the Board's jurisdiction. On February 14 and February 7, 2006, Petitioners responded to the Order to Show Cause and showed that MSPB had jurisdiction over the Petitioners' IRA appeals. See Appendix pp. A26 and A34.

11) The Petitioners' IRA appeals were dismissed, however, because MSPB administrative judge narrowly construed the remedial aspect of WPA statute and made clearly erroneous interpretations of facts and law.

12) In response, Petitioners filed appeals with the full MSPB, which denied petitions for review, thereby rendering the Initial Decisions as final. Petitioners timely appealed MSPB final decisions to the Court of Appeals for Federal Circuit pursuant to 28 U.S.C. § 1295(a)(9), to consider jurisdictional interpretation of the WPA and implied cause of action for retaliations.

ARGUMENTS FOR ALLOWANCE OF THE WRIT

The Whistleblower Protection Act (WPA) makes it a prohibited personnel action to take or fail to take a personnel action because of "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -- (i) a violation of any law, rule, or regulation, ... " 5 U.S.C. § 2302(b)(8)(A) (emphasis added). The scope of disclosures covered by the WPA was deliberately broad. Without question the anti-retaliation provisions are violated whenever the employer responds to protected activity in such a way that a reasonable employee would have found the challenged action materially adverse. *Burlington N. & S.F. Ry. v. White, 26 S. Ct. 2405, 2415 (2006).* The questions arise whether the anti-retaliation provisions of the WPA encompass retaliations against a family member. The Title VII and WPA anti-retaliation statutes forbid retaliation with respect to any employee or applicant for employment "because he" or "the employee" has engaged in protected conduct. 42 U.S.C. § 2000e-3(a) (2000) and 5 U.S.C §2302(b)(8) & (9) (2005). In *Robinson v. Shell Oil Co.*, 519 U.S. 346 (1997), this Court's interpretation of the term "employees" to include "former employees" in Title VII provides authority for how the use of the word "he" should be interpreted because words were analyzed in the same antiretaliation provision under which plaintiffs bring third-party claims. Broadening retaliation claims to include third-party claims is also consistent with the Act's remedial purpose of providing "unfettered access to statutory remedial mechanisms." *Id.* This Court's interpretation of language in antiretaliation statutes provides realistic bases for presuming that Congress expected to provide broad protection in the retaliation provisions.

The Appeals Court for Federal Circuit, however, narrowly interprets the WPA anti-retaliation statute because on its face relief at the MSPB provided only for complaints by employees "with respect to any personnel action taken, or proposed to be taken, against such employee;" (emphasis

added), although the ambiguity of the language allows the third-party retaliation claims consistent with both the context and purpose of the antiretaliatory nature of the WPA statute codified at 5 U.S.C § 2302(b)(8) & (9) (2005), 5 U.S.C. §1221(a). The unreasonably narrow interpretations of the third-party retaliation claims by the Appeals Court for the Federal Circuit in the MSPB decisions are in conflict with the Appeals Court for the Seventh Circuit broad interpretation of antiretaliation statute: "[T]o retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB v. Advertisers Mfg. Co., 823 F.2d 1086, 1088 (1987).* Other courts also expressly acknowledged the viability of third-party retaliation claims. See, e.g., *EEOC v. Nalbandian Sales*, Inc., 36 F. Supp. 2d 1206, 1212 (E.D.Cal. 1998); *De Medina v. Reinhardt*, 444 F. Supp. 573, 580 (D.D.C. 1978). In addition, the authoritative decisions of other U.S. Courts of Appeals provide bases for broad interpretation of protection in the antiretaliation provisions. See *EEOC v. Ohio Edison Co., 7 F.3d 541, 546 (6th Cir. 1993); Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989). Moreover, this Court's interpretation of language in antiretaliation statutes provides realistic bases for presuming that Congress expected to provide broad protection in the retaliation provisions. See *Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).*

However, to support narrow interpretation of the third-party retaliation claim under WPA, the Appeals Court for the Federal Circuit quibble: "NLRA defines 'unfair labor practices' not just as discrimination against an employee because of his union activities, but also as any practice that interferes with, restrains, or coerces employees in exercising union rights" contrary to this Court's explanation of the rationale for providing broader protection in the retaliation provision believing that Congress intended the antiretaliation provision to secure "that primary objective by preventing an employer from interfering (through retaliation) with the employee's efforts to secure or advance enforcement of the

Act's basic guarantees." See *Stoyanov v. Dep't of the Navy,* (Appendix p. A15); *White*, 26 S. Ct. 2405, 2415 (2006). Thus, the antiretaliation provision of WPA, Title VII and the NLRA statutes equally secure "that primary objective" of unfettered access to remedial mechanisms because the anti-retaliation provisions recognize that enforcement of laws depends in large part on employees to initiate administrative and judicial proceedings. This Court has "drawn analogies... in other Title VII contexts" to the NLRA also. *Id.*

In addition, the interpretation of a federal statute by the Equal Employment Opportunity Commission (EEOC) is entitled to some deference because it is charged with enforcing compliance with Title VII. The EEOC Compliance Manual states that Title VII prohibits "retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights." See EEOC Compliance Manual § 614:0005 (2003). Both the individual who engaged in a protected activity and the relative who was retaliated against can challenge the retaliation. *Id.* The EEOC stated: "it is long settled that third party reprisals are cognizable under EEO law." *Id.* (citing *De Medina v. Reinhardt, 444 F. Supp. 573, 580–81 (D.D.C. 1978)*). In *De Medina*, the court rejected the defendant's argument that the plaintiff failed to state a claim under 42 U.S.C. § 2000e-3 because the plaintiff was not the person whose protected activities were allegedly impeded by retaliation. *Id.* at 580. The court explained that the section's language indicated Congress did not expressly consider such third-party reprisals and that prohibiting the claims would undermine Congress's clear intent. *Id.* If third-party reprisals were tolerated, they would deter people from exercising their protected rights just as much as direct reprisals would. *Id.* The anti-retaliation provision of the WPA like the Title VII "...anti-retaliation provision seek to prevent harm to individuals based on what they do, *i.e.*, their conduct." *White, 26 S. Ct. 2405, 2413 (2006).*

The antiretaliatory nature of the WPA and Title VII statutes for federal government employees, codified at 5 U.S.C §2302(b)(8) & (9) (2005), and at 42 U.S.C. § 2000e-3(a) (2000), prohibit retaliation. Because the antiretaliation provisions of the WPA and the antiretaliation provision of the Title VII are nearly identical, the precedent interpreting any one of these statutes is equally relevant to interpretation of the others. See *Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997.* Nevertheless, the Appeals Court for the Federal Circuit propped up its narrow interpretation of the third-party retaliation claim under WPA referring to *Glover v. Dep't of the Army, 94 M.S.PB 534 (2003)* (holding that a widower did not have standing to bring an IRA based on violation of the WPA on behalf of her deceased husband). See *Stoyanov v. Dep't of the Navy,* (Appendix p. A16*)*. However, the *Glover* case is materially different to the Petitioners' appeals because the widower in *Glover* did not engage in the Whistleblowing activity nor was employed by the Federal agency contrary to the Petitioners' cases. Petitioners participated in Whistleblowing activities and appealed to the chain of Navy Command (specifically to the agency Commander Admiral Macy) disclosing violations of the Navy policy, laws, rules, or regulations as was stated in the complaints of prohibited personnel practice to the OSC that authorized the filing of IRA appeals with the MSPB. The MSPB has the power to further compliance with the WPA as the EEOC has the power to further compliance with the Title VII. See 5 U.S.C. § 1221(e), § 2000e-4(g)(3). Consequently, MSPB's narrow interpretation of the WPA runs counter to the purpose of the remedial legislation authorizing the filing of IRA appeals to be "interpreted liberally, to embrace all cases fairly within their scope, so as ... to effectuate the purpose of the statute...." 82 C.J.S. *Statutes*, § 377 (1999).

Courts routinely apply "retaliation provisions of employment statutes to matters not expressly covered by the literal terms of these statutes where the policy behind the

statute supports a non-exclusive reading of the statutory language." *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993). The court construed the phrase "he has opposed any practice" to mean "he or his representative has opposed any practice" because it was consistent with the section's purpose of prohibiting retaliation against protected activity. *Id.* at 545. The opposite, restrictive interpretation of the section "would allow an employer to retaliate with impunity if someone engaged a representative to act on his behalf and would frustrate the Act's purpose to prevent retaliation for opposing unlawful employment practices." The court noted that the causal link between the person retaliated against and the person engaged in the protected activity was clear because the coworker was protesting the allegedly discriminatory discharge of the plaintiff. *Id.* at 546. The analogy of prohibiting retaliation against the third-party protected under the Title VII established bases for broader interpretation of retaliation claim under the WPA.

The Appeals Court for the Federal Circuit decision also misapprehended and conflicts with the facts in the current case quoting the Board's clearly erroneous Initial Decision: "that his disclosures [do not] involve[d] anything other than matter related to EEO activities" contrary to the facts in the case clearly establishing intent to raise an issue with a higher authority who is in a position to correct the violations of laws and the Navy policy of zero tolerance to discrimination. *Stoyanov v. Merit Systems Protection Board* (Appendix p. A8). "The purpose of the WPA is to encourage disclosures of wrongdoing to persons who may be in a position to act to remedy it." See e.g., *Huffman v. Office of Personnel Management, 23 F.3d 1342, 1350, (Fed. Cir. 2001).* In addition, the plain language of the Whistleblower Protection Act extends to retaliation for "<u>any</u> disclosure", regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made. Notwithstanding the appellant's non-frivolous allegations of prohibited personnel actions, the MSPB administrative judge

clearly erred interpreting material facts and law by unjustly dismissing the appeal for lack of jurisdiction and denying the Petitioners adjudication on the merits of the claim.

In fact, the MSPB administrative judge's Initial Decisions involved a clearly erroneous interpretation of material facts and law relying on *Garcia v. Department of Homeland Security, 437 F.3d 1322, 1344 (Fed. Cir. 2006),* when reciting the standard by which the Board determines it has jurisdiction. The MSPB administrative judge abused his discretion issuing the order to show cause without providing the Petitioners with explicit information concerning what was required to establish Board's jurisdiction. An MSPB appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *See Burgess v. Merit Systems Protection Board,* 758 F.2d 641, 643-44 (Fed. Cir. 1985). Also, *Garcia* involved an allegation of constructive adverse action by an agency and was filed pursuant to 5 U.S.C. § 7512, *Id at 1324,* whereas the Petitioner's appealed actions involved an IRA filed pursuant to 5 U.S.C. § 1221. In IRA appeals the issues of jurisdiction overlap with the merits. *Spruill v. MSPB, 078 F.2d 679, 687-88. (Fed. Cir. 1992).* The nature and specificity of the Petitioner's allegations should have placed the administrative judge on notice that the Petitioners raised claims that the agency had violated antiretaliation provision of WPA because of clear evidence of the causal connection. See *Response to the Order to Show Cause* by A. Stoyanov on February 14, 2006 (Appendix p. 49), and by Y. Stoyanov on February 4, 2006 (Appendix p. 59). The MSPB administrative judge's initial decision, however, was arbitrary and involved a clearly erroneous interpretation of facts and law. Contrary to the fact that *Garcia* did not control the jurisdictional issue in these cases, requirement "[t]he appellant has the burden of proving by preponderant evidence that the Board has jurisdiction over his appeal" was capricious. The *Spruill* court held that as a general matter, "jurisdiction existed [ ] as long as the petition asserted

nonfrivolous claims;" and explained: "[W]hen we refer to cases involving the "jurisdiction" of the MSPB, we do not include cases the merits of which turn on the existence of a state of facts when those facts happen also to be the factual predicate for jurisdiction. When a nonfrivolous claim for relief has been asserted before the Board, and the outcome is determined by whether the facts support that claim, a decision by the Board that they do not is a failure to prove the claim, not a lack of jurisdiction in the Board." *Id.* As a result, *Garcia* did not control the jurisdictional issue in these cases and the MSPB decisions involved clearly erroneous interpretations of facts and law that require different judgment in these cases.

Wherefore, in consideration of the above, Petitioners Dr. Yuri Stoyanov and Dr. Aleksandr Stoyanov submit for the Court's consideration and decision an important question of federal law that should be settled by this Court's interpretation of the Whistleblower Protection Act.

CONCLUSION

To apply the laws consistently to all cases this court should overrule the appeals court decisions based on narrow interpretation of the remedial policies underpinning antiretaliation protection of the WPA to allow the third-party retaliation claims implied in the context and purpose of the remedial statute. Facts in these cases support Petitioners' cause and these cases should be remanded and decided on the merits of each case. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

7/10/07 Aleksandr Stoyanov
Date Aleksandr Stoyanov and Yuri Stoyanov
Yuri Stoyanov

APPENDIX

NOTE: This order is nonprecedential.
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing en banc having been filed by the Petitioner, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 23, 2007.

FOR THE COURT,

s/
Jan Horbaly
Clerk

Dated: 04/16/2007
cc: Yuri J. Stoyanov
Raymond W. Angelo

STOYANOV V MSPB, 2006-3358,-3359
(MSPB – DC-1221-06-0160-W-I)

NOTE: This order is nonprecedential.
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing en banc having been filed by the Petitioner, and a response thereto having been invited by the court and filed by the Respondent, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED. The mandate of the court will issue on April 20, 2007.

FOR THE COURT,

s/
Jan Horbaly
Clerk

Dated: 04/13/2007
cc: Aleksandr J. Stoyanov
Christopher J. Carney
STOYANOV V NAVY, 2006-3363
(MSPB – DC-1221-06-0266-W-1)

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2006-3358, - 3359

YURI J. STOYANOV,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

Yuri J. Stoyanov, of Fulton, Maryland, pro se.

Raymond W. Angelo, Acting Associate General Counsel, Office of the General Counsel, United States Merit Systems Protection Board, of Washington, DC, for respondent. With him on the brief were B. Chad Bungard, General Counsel, and Rosa M. Koppel, Deputy General Counsel.

Appealed from: United States Merit Systems Protection Board

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2006-3358, -3359

YURI J. STOYANOV,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: February 12, 2007

Before SCHALL, Circuit Judge, CLEVENGER, Senior Circuit Judge, and GAJARSA, Circuit Judge.

PER CURIAM.

DECISION

Yuri J. Stoyanov petitions for review of two final decisions of the Merit Systems Protection Board ("Board") that dismissed his appeals for lack of jurisdiction. Stoyanov v. Merit Sys. Prot. Bd., No. DC-1221-06-0160-W-1 (M.S.P.B. July 27, 2006) ("first Final Decision"); Stoyanov v. Merit Sys. Prot. Bd., No. DC-531D-06-0228-I-1 (M.S.P.B.

Aug. 3, 2006) ("Second Final Decision").[1] We affirm.

DISCUSSION

Mr. Stoyanov is a scientist with the Naval Surface Warfare Center at Carderock, Maryland. Stoyanov v. Dept of the Navy, No. DC-1221-06-0160-W-1 (M.S.P.B. July 27, 2006) ("First Initial Decision"). After coming to the belief that the Navy had discriminated against him and his brother,[2] he filed Equal Employment Opportunity ("EEO") complaints with the Equal Employment Opportunity Commission ("EEOC"). Mr. Stoyanov alleges that after he filed those complaints, the Navy retaliated against him. As a result, Mr. Stoyanov filed complaints with OSC alleging that the Navy's retaliation was because of his disclosure that the Navy had failed to follow its rules and regulations prohibiting discrimination and had violated its "zero tolerance policy" on discrimination. jç~ at 2-3. Mr. Stoyanov claims that the retaliation was that he was denied a within-grade pay increase ("WIGI"), had a three-day suspension proposed, was issued a Letter of Reprimand, and had "discriminatory restrictions" imposed on him. hi. After OSC informed Mr. Stoyanov that it would not pursue his claims, he filed an IRA appeal with the Board in which he claimed that the discrimination to which he allegedly had been subjected was in reprisal for protected whistleblowing activities under the Whistleblower Protection Act ("WPA"). First Initial Decision at 3. Later, Mr. Stoyanov filed a second IRA appeal, after the OSC terminated investigations arising out of other complaints he had filed. See Stoyanov v. Dep't of the Navy,

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[1] The Board treated the appeals separately, but they have been consolidated before this court.

[2] Mr. Stoyanov's brother, who also was employed at Carderock, filed a whistleblower complaint against the Navy with the Office of Special Counsel ("OSC"). After OSC terminated its inquiry in the matter, Mr. Stoyanov's brother brought an individual right of action ("IRA") appeal before the Board. On January 26, 2007, this court affirmed the Board's dismissal of the appeal for lack of jurisdiction. Stoyanov v. Dept of the Navy, No. 2006-3363 (Fed. Cir. Jan. 26, 2007).

No. DC-531D-06-0228-I-1, at 3 (M.S.P.B. March 22, 2006) ("Second Initial Decision").

In the First Initial Decision, the Administrative Judge ("AJ") to whom the appeal was assigned dismissed the appeal on the ground that the Board lacked jurisdiction. The AJ explained that Mr. Stoyanov had the burden of establishing Board jurisdiction by a preponderance of the evidence. First Initial Decision at 2. The AJ explained that an IRA appellant

> must show that he has exhausted his administrative remedies before the [OSC] and make nonfrivolous allegations that: (1) he engaged in whistleblowing activities by making a protected disclosure under 5 U.S.C. § 2303(b)(8); i.e., he disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a).

Id. at 2. The AJ further explained that Mr. Stoyanov had to present the precise grounds for his charge of whistleblowing to OSC and could not, on appeal, recharacterize or add to those grounds. Id. at 3. The AJ reviewed Mr. Stoyanov's September 23, 2005 complaint to OSC and OSC's October 26, 2005 letter terminating its investigation.[3] Id. The AJ determined that the proposed suspension was a "personnel action" under 5 U.S.C. § 2302(a)(2)(A), but that "discriminatory restrictions" were not. Id. at 3-4. The AJ also determined that "the extant record as provided by the appellant did not show that he engaged in protected

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[3] The AJ noted that Mr. Stoyanov did not include in his September 23, 2005 complaint to OSC allegations relating to his WIGI denial and the issuance of a reprimand. The AJ therefore determined that those actions were not part of the appeal. First Initial Decision at 3. As will be seen, the WIGI denial was covered in the Second Initial Decision.

whistleblowing activity; i.e., that he made disclosures protected under 5 U.S.C. § 2302(b)(8)." Id. at 4. In that regard, the AJ noted that Mr. Stoyanov did not differentiate in his complaint between protected "EEO and Whistleblowing activities." Id. The AJ stated that

> [a]lthough reprisal against an individual who files an EEO complaint is a violation of 5 U.S.C. § 2302(b)(9), as well as a violation of the antidiscrimination statute furnishing the basis for the underlying complaint, the filing of an EEO complaint does not constitute whistleblowing activity protected under 5 U.S.C. § 2302(b)(8).

Id. at 4. Because the AJ found only EEO complaints underlying Mr. Stoyanov's IRA, which would not provide jurisdiction to the Board, he issued an Order to Show Cause in which he explained the jurisdictional issue and gave Mr. Stoyanov an opportunity to prove the Board had jurisdiction over his appeal. a at 6. The AJ found Mr. Stoyanov's reply "generally non-responsive" and insufficient to meet his burden to show jurisdiction. Id. The AJ therefore dismissed the appeal. Id. at 7.

The First Initial Decision became the First Final Decision of the Board when the Board denied Mr. Stoyanov's petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115(d). First Final Decision at 1-2.

II.

In the Second Initial Decision, the same AJ dismissed Mr. Stoyanov's second IRA appeal for lack of jurisdiction. Second Initial Decision at 5-6. In his second appeal Mr. Stoyanov complained that the denial of a WIGI was reprisal for protected whistleblowing activity, Id. at 3, The AJ determined that Mr. Stoyanov had not exhausted his remedies with the OSC and therefore thought the Board might not have jurisdiction. Id. Specifically, the AJ thought that OSC had not affirmed its initial decision upon reconsideration. Id. The AJ thus issued an Order to Show Cause explaining the

jurisdictional issues and Mr. Stoyanov's burden of proof. Id. 3-4. In response, Mr. Stoyanov submitted "a generally non-responsive pleading" and a January 19, 2006 letter from OSC advising Mr. Stoyanov that OSC File No. MA-06-0733 would not be subject to OSC action. Id. at 4. The AJ found that "the OSC complaint signed by the appellant on December 29, 2005, in fact is not the same complaint closed by OSC on January 19, 2006." Id. at 5. Thus, the AJ concluded that Mr. Stoyanov had not exhausted his administrative remedies and that therefore the Board lacked jurisdiction over his appeal. Id.

The Second Initial Decision became the Second Final Decision of the Board when the Board denied Mr. Stoyanov's petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § *1201.115(d)*. Second Final Decision at 1-2.

These consolidated appeals followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

III.

Our scope of review in an appeal from a decision of the Board is limited. Specifically, we must affirm the Board's decision unless we find it to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required law, rule, or regulation having been followed; or unsupported by substantial evidence. 5 U.S.C. § 7703(c); Kewley v. Dep't of Health & Human Servs., 153 F.3d 1357, 1361 (Fed. Cir. 1998). The jurisdiction of the Board is a legal question that we review de novo. Campion v. Merit Sys. Prot. Bd., 326 F.3d 1210, 1213 (Fed. Cir. 2003). Mr. Stoyanov had the burden of establishing the Board's jurisdiction by a preponderance of the evidence, Id. (citing 5 C.F.R. § 1201.56(a)(2) (2001)).

The Board's jurisdiction is limited by law, rule, or regulation. Clark v. Merit Sys. Prot. Bd., 361 F.3d 647, 650 (Fed. Cir. 2004). Board jurisdiction over an IRA appeal requires that an appellant show that he has exhausted his administrative remedies before OSC and has made a

nonfrivolous allegation that "(1) he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a)." Yunus v. Dep't of Veterans Affairs, 242 F.3d 1367, 1371 (Fed. Cir. 2001). As the Board noted, the only whistleblowing allegations that may be considered are those originally asserted before OSC, and not recharacterizations of, or additions to, those allegations. Ellison v. Merit Sys. Prot. Bd., 7 F.3d 1031, 1036 (Fed. Cir. 1993). As the Board also noted, allegations of EEO violations under 5 U.S.C. §2302(b)(1) and (b)(9) do not qualify as whistleblowing allegations; they are presented to the EEOC. Spruill v. Merit Sys. Prot. Bd. 978 F.2d 679, 691-92 (Fed. Cir. 1992).

Mr. Stoyanov's main argument on appeal is that the Board made findings of fact and that the Board did have jurisdiction to hear his appeals. He argues that his disclosures "made to the Navy chain of command that agency administration failed to enforce compliance with laws, regulations, and to take immediate disciplinary actions against responsible management officials violating EEOC-OFO Order, Navy policy and its enforcement constituted the Whistleblowing activity protected under 5 U.S.C. §2302(b)(8)." He also argues that the "[d]irect evidence in the record established that I and my brother were engaged in protected Whistleblowing activities."

The Board responds that the First Final Decision was correct because Mr. Stoyanov "does not explain that his purported disclosures involved anything other than matters related to EEO activities." Thus, because EEO disclosures are not protected under the WPA, the Board properly held that it lacked jurisdiction over Mr. Stoyanov's first IRA appeal. The Board also argues that because neither the denial of the WIGI nor the letter of reprimand had occurred when OSC terminated its inquiry, Mr. Stoyanov could not have exhausted his remedies with respect to those matters.

As for the Second Final Decision, the Board argues that although the decision was based on an erroneous finding of fact, it should nonetheless be affirmed because the Board did lack jurisdiction. Specifically, the Board explains that the AJ's finding that Mr. Stoyanov had not exhausted his administrative remedy was erroneous because Mr. Stoyanov's OSC file no. MA-06-0733 had been closed six days after he filed his appeal, but before the AJ dismissed Mr. Stoyanov's appeal.[4] Nevertheless, it argues that "It]he essence of Mr. Stoyanov's IRA appeal involved allegations that the Navy denied his WIGI in reprisal for his EEO activity and his support of his brother's EEO activity." The Board explains that although agency decisions cannot generally be upheld on a different ground, Sec. & Exch. Comm'n v. Chenery, 318 U.S. 80, 95 (1943), because the Board's jurisdiction is a legal question not involving deference and does not require additional fact finding, we should affirm the Board's decision despite its factual error.

On appeal, the Board explains that the six day early filing of Mr. Stoyanov's appeal is not a basis to dismiss Mr. Stoyanov's appeal "because of the brief period between the premature filing and exhaustion before OSC." Normally, because the parties cannot create their own jurisdiction, Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986), we would be forced to address this issue. However, because we affirm the Board's decision for lack of jurisdiction on other grounds, we need not reach it. see Killip v. Office of Pers. Mgmt., 991 F.2d 1564, 1568-69 (Fed. Cir. 1993); see also Grabis v. Office of Pers.. Mgmt., 424 F.3d

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[4] On appeal, the Board explains that the six day early filing of Mr. Stoyanov's appeal is not a basis to dismiss Mr. Stoyanov's appeal "because of the brief period between the premature filing and exhaustion before OSC." Normally, because the parties cannot create their own jurisdiction, Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986), we would be forced to address this issue. However, because we affirm the Board's decision for lack of jurisdiction on other grounds, we need not reach it.

1265, 1270 (Fed. Cir. 2005) ("In other words, Chenery does not apply if there is no room for the agency to exercise discretion in deciding the legal issue under review.").

We agree with the Board as far as both appeals are concerned. For the First Final Decision, the Board's finding that Mr. Stoyanov's OSC complaint related only to EEO activities is dispositive. First Final Decision at 6. As discussed above, EEO activities fall under 5 U.S.C. § 2302(b)(9) and are outside the scope of the WPA. Spruill, 978 F.2d at 691-92. Therefore, because Mr. Stoyanov did not prove by a preponderance of the evidence that he had made a protected disclosure to OSC, the Board correctly determined that it lacked jurisdiction over the IRA appeal that was the focus of the First Final Decision. See Yunus, 242 F.3d at 1371.

Turning to the Second Final Decision, Mr. Stoyanov is bound by his complaints to the OSC and cannot post hoc rationalize them or add to them. See Ellison, 7 F.3d at 1036. Reviewing those complaints, it is clear as a matter of law that Mr. Stoyanov again raised only EEO activities. Indeed, much of the complaint upon which his second IRA was based is identical to the complaint upon which his first IRA was based. Because Mr. Stoyanov failed to meet his burden of establishing that he made a protected disclosure as a matter of law, dismissal of his second IRA appeal for lack of jurisdiction was proper. Additionally, we note that we agree with the Board's analysis on appeal that this case is appropriate to decide on an alternate ground without contravening Chenery. See Grabis, 424 F.3d at 1270.

We have considered Mr. Stoyanov's other arguments and find them without merit. For the forgoing reasons, the final decisions of the Board are affirmed.

United States Court of Appeals for the Federal Circuit
2006-3363

ALEKSANDR J. STOYANOV,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

Aleksandr J. Stoyanov, of Fulton, Maryland, pro se.
Gregory T. Jaeger, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent. With him on the brief were Peter D. Keisler, Assistant Attorney General; David M. Cohen, Director; and Deborah A. Bynum, Assistant Director.
Appealed from United States Merit Systems Protection Board

United States Court of Appeals for the Federal Circuit
2006-3363

ALEKSANDR J. STOYANOV,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

DECIDED: January 26, 2007

Before GAJARSA, MOORE and JORDAN,* Circuit Judges.
MOORE, Circuit Judge.

Aleksandr J. Stoyanov ("Stoyanov") seeks review of a final order of the Merit Systems Protection Board ("the Board") dismissing his individual right of action ("IRA") appeal for lack of jurisdiction. Stoyanov v. Dep't of the Navy, No. DC1221060266-W-1 (M.S.P.B. Aug. 2, 2006). Because Stoyanov did not set forth nonfrivolous allegations of a prohibited personnel action taken against him in his

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* Honorable Kent A. Jordan, United States Court of Appeals for the Third Circuit, sitting by designation.

original pleading to the Office of Special Counsel ("OSC"). the Board properly dismissed his appeal for lack of jurisdiction. We affirm.

BACKGROUND

Stoyanov is a former employee of the Naval Surface Warfare Center Carderock Division ("the agency"). Stoyanov has numerous complaints pending against the Department of the Navy in district court as well as with the Equal Employment Opportunity Commission ("EEOC") relating to his employment with the agency. In December 2005, Stoyanov filed a whistleblower complaint with the OSC, alleging that the agency was escalating intentional discrimination against Stoyanov's brother, Dr. Yuri Stoyanov, based on the whistleblowing activities of both brothers.

The alleged whistleblowing activities include Stoyanov's reporting alleged violations of EEOC laws and regulations by the agency as well as the agency's failure to enforce a March 2005 EEOC Order. Stoyanov claimed in his OSC complaint that the whistleblowing occurred in an August 2005 disclosure to a Navy Captain and in a November 2005 disclosure to the Secretary of the Navy. Stoyanov's OSC submission complained of five specific agency actions, four of which were taken against his brother, Dr. Yuri Stoyanov. These four actions are: (1) issuance of a Notice of Proposed Suspension on September 7, 2005; (2) issuance of a false performance evaluation on November 1, 2005; (3) denial of a within-grade promotion on November 14, 2005; and (4) issuance of a Letter of Reprimand on November 22, 2005. Stoyanov's fifth claim related to an alleged conspiracy among Navy officials in failing to enforce the March 2005 EEOC Order against responsible management officials. The March 2005 EEOC Order, Stoyanov explains, contained the EEOC's directives for disciplinary actions to be taken against agency personnel involved in prohibited discrimination against Stoyanov.

By letter dated January 20, 2006, the OSC informed Stoyanov that it had terminated its inquiry into his allegations, and that he could seek corrective action from the Board for any personnel action taken or proposed to be taken against him due to the alleged whistleblowing activity that was the subject of his OSC complaint. Stoyanov thereafter filed a timely IRA appeal with the Board, pursuant to 5 U.S.C. § 1221. Upon review of Stoyanov's appeal, an Administrative Judge ("AJ") issued an order to show cause, ordering Stoyanov to provide evidence and argument to prove that his claim was within the Board's jurisdiction. Specifically, the AJ noted that Stoyanov's OSC complaint was limited to allegations of personnel actions that the agency took or proposed with respect to his brother, Dr. Yuri Stoyanov. Stoyanov responded with a pleading that the AJ characterized as "reiterat[ing] many of the allegations set forth in his initial submission." The agency also responded, arguing that Stoyanov's appeal should be dismissed for lack of jurisdiction because none of the alleged actions involved Stoyanov himself.

The AJ dismissed the appeal, concluding that the Board could only consider the allegations raised to the OSC, and each of those allegations involved personnel actions taken or proposed against Stoyanov's brother. Thus, the AJ concluded that the Board has jurisdiction over IRA appeals alleging violations of the Whistleblower Protection Act ("WPA") for federal government employees, codified at 5 U.S.C. § 2302(b)(8) & (9), only for personnel actions taken or proposed with respect to the IRA appellant himself.[1]

Stoyanov appealed the AJ's initial decision to the full Board, which denied his petition for review, thereby

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[1] The AJ's decision was based on the statute establishing the right to bring an IRA before the Board, 5 U.S.C. § 1221, and not upon the statute prohibiting the government from taking certain personnel actions based on an employee's whistleblowing activities, 5 U.S.C. § 2302 (b)(8)-(9).

rendering the AJ's decision final. See 5 C.F.R. § 1201.113(b). Stoyanov timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9) (2000).

DISCUSSION

The scope of our review in an appeal from a Board decision is limited. We must affirm the decision of the Board unless it is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c) (2000). Whether the Board has jurisdiction to adjudicate an appeal is a question of law that we review de novo. Campion v. Merit Sys. Prot. Bd., 326 F.3d 1210, 1213 (Fed. Cir. 2003). Stoyanov, as petitioner, has the burden of establishing the Board's jurisdiction by a preponderance of the evidence. Id. (citing 5 C.F.R. § 1201.56(a)(2) (2001)).

The Board's jurisdiction is not plenary, but is limited to those matters over which it has been granted jurisdiction by law, rule, or regulation. Clark v. Merit Sys. Prot. Bd., 361 F.3d 647, 650 (Fed. Cir. 2004). To establish the Board's jurisdiction over an IRA appeal, we have held that an appellant must demonstrate that he exhausted his administrative remedies before the OSC and make non-frivolous allegations that: (1) he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8); and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). Yunus v. Dep't of Veterans Affairs, 242 F.3d 1367, 1371 (Fed. Cir. 2001). The Board's jurisdictional statute states that the right to file an IRA appeal is limited to employees, former employees, or applicants for employment "with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment." 5 U.S.C. § 1221(a). Based upon this statute, the Board dismissed for lack of jurisdiction on the ground that Stoyanov failed to make an

allegation to the OSC involving a personnel action taken or proposed to be taken against Stoyanov himself.

On appeal, Stoyanov argues that the Board erred in three ways: (1) that the anti-retaliation nature of the WPA requires it to be read broadly to encompass retaliation by an agency against a whistleblower's family members; (2) that the Board failed to properly consider all of the allegations that he made to the OSC; and (3) that the Board erred in relying on Garcia v. Department of Homeland Security, 437 F.3d 1322 (Fed. Cir. 2006) (en banc), in assessing its jurisdiction. None of these arguments, which we will address in turn, is persuasive.

I

First, Stoyanov argues that the overall purpose of the WPA is intended to promote the reporting and investigation of violations of laws, rules, regulations, and abuse of authority in the workplace. Accordingly, Stoyanov argues that permitting retaliation against a whistleblower's family runs afoul to the anti-retaliatory nature of the statute. In support, Stoyanov cites a decision from the Seventh Circuit holding that discharging a supervisor in retaliation for the supervisor's relative's union activities could violate the National Labor Relations Act ("NLRA"), despite the fact that supervisors were explicitly excluded from protection under the NLRA. Nat'l Labor Relations Bd. v. Advertisers Mfg. Co., 823 F.2d 1086, 1088 (7th Cir. 1987) ("[T]o retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations."); see 29 U.S.C. § 152(3) (excluding supervisors from NLRA). Stoyanov suggests that the Seventh Circuit properly recognized that retaliatory acts taken against a family member are akin to taking the acts against a person himself.

The NLRA statute at issue in Advertisers Manufacturing, however, is quite different than the statute giving the Board jurisdiction over IRA appeals. Specifically, the NLRA defines "unfair labor practices" not just as

discrimination against an employee because of his union activities, but also as any practice that interferes with, restrains, or coerces employees in exercising union rights (as provided in 29 U.S.C. § 157). 29 U.S.C. § 158(a)(1)-(4). Thus, the unfair practice need not be directed at the employee bringing an NLRA claim. Accordingly, it was reasonable for the Seventh Circuit to find that firing an employee's mother hurt the employee in such a way as to "interfere, restrain or coerce" the employee's union activities, in violation of the NLRA. Advertisers Mfg., 823 F.2d at 1088.

Unlike the NLRA, the IRA statute provides relief at the Board only for complaints by employees, former employees, and applicants for employment "with respect to any personnel action taken, or proposed to be taken, against such employee." 5 U.S.C. § 1221(a) (emphasis added). We agree with the Board that the statute on its face clearly requires that the allegedly improper personnel practice must be taken or proposed to be taken against the person bringing the IRA appeal. Stoyanov v. Dep't of the Navy, No. DC-1221060266-W-1, at 3 (M.S.P.B. Mar. 30, 2006); see also Glover v. Dep't of the Army, 94 M.S.P.R. 534 (2003) (holding that a widower did not have standing to bring an IRA based on a violation of the WPA on behalf of her deceased husband). Despite Stoyanov's argument that this narrow interpretation runs counter to the purpose of the statute, the language of the statute is clear. Moreover, this determination is consistent with our decisions finding that Congress did not intend the WPA to cover every action in the workplace. See e.g., King v. Health & Human Servs., 133 F.3d 1450, 1452-53 (Fed. Cir. 1998) (holding that a progress report was not a "performance evaluation" under the WPA) (citing H.R. Conf. Rep. No. 95-1717, at 129-30 (1978)); Frederick v. Dep't of Justice, 73 F.3d 349, 353-54 (Fed. Cir. 1996) (holding that one negative report, out of ten reports made during a training period was not a "performance evaluation" under the WPA); Weber v. Dep't of the Army, 9 F.3d 97, 101 (Fed. Cir. 1993) (holding that the failure to

select one employee's engineering proposal over others was not a personnel action).

Accordingly, the Board properly concluded that it did not have jurisdiction to adjudicate Stoyanov's allegations that the Department of the Navy was taking, or proposing to take, actions against his brother in retaliation for Stoyanov's whistleblowing activities.

II

Next, Stoyanov argues that the Board did not properly consider each of the allegations that he made to the OSC. We disagree.

Other than the allegations involving his brother, discussed above, the only other specific acts mentioned in Stoyanov's initial OSC complaint involve failure by the agency to enforce the March 2005 EEOC Order. As above, this is not a personnel action taken, or proposed to be taken, against Stoyanov. See 5 U.S.C. § 1221(a). The OSC complaint provides no other specific allegations of an agency personnel action that the Board could have considered. See Ward v. Merit Sys. Prot. Bd., 981 F.2d 521, 526 (Fed. Cir. 1992) (holding the Board has jurisdiction over whistleblower's action only if petitioner first specified the exact grounds of wrongdoing to the Office of Special Counsel). In fact, the alleged protective disclosures in this case were made in August and November 2005 and involve Stoyanov reporting the agency's noncompliance with a March 2005 EEOC Order. Those disclosures occurred two years after Stoyanov's employment with the Department of Navy terminated. Although a personnel practice under the WPA could arise after termination of employment (such as a decision regarding reinstatement or payment of benefits, respectively, under 5 U.S.C. § 2302(a)(2)(A)(v) & 2302(a)(2)(A)(ix)), no such allegation has been made by Stoyanov in this case.

Because an IRA appellant must exhaust his remedies for WPA allegations with the OSC, and because, in this case, the Board correctly held that Stoyanov did not raise an

allegation to the OSC involving a personnel practice taken against him, the Board properly dismissed his appeal for lack of jurisdiction. Clark, 361 F.3d at 651 (citing 5 U.S.C. §§ 1221(a), 1214(a)(3)).

III

Finally, Stoyanov argues that the Board's decision should be reversed because the AJ improperly relied on Garcia when reciting the standard by which the Board determines it has jurisdiction. The Garcia case involved an allegation of constructive adverse action by an agency, which is filed pursuant to 5 U.S.C. § 7512, 437 F.3d at 1324, whereas the present action involves an IRA filed pursuant to 5 U.S.C. § 1221. In Garcia, however, this court did address IRA appeals, and reiterated the standard by which an appellant establishes the Board's jurisdiction. 437 F.3d at 1324. Specifically, this court reaffirmed its holding in Spruill v. Merit Systems Protection Board, 978 F.2d 679, 687-89 (Fed. Cir. 1992), that for IRA appeals, the Board's jurisdiction is established by nonfrivolous allegations that the appellant made a protected disclosure that was a contributing factor to the personnel action taken or proposed. Garcia, 437 F.3d at 1325.

Accordingly, the AJ's reliance on Garcia was appropriate. The AJ properly recited the standard for jurisdiction in IRA appeals and concluded that the standard was not met in this case.

CONCLUSION

We have reviewed Stoyanov's remaining arguments and find them to be unpersuasive. For the foregoing reasons, we conclude that the Board did not err in holding that it lacked jurisdiction over Stoyanov's appeal. The decision of the Board is therefore affirmed.

AFFIRMED

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

YURI J. STOYANOV,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
DC-1221-06-0160-W-1

DATE: July 27. 2006

Yuri .J. Stoyanov, Fulton, Maryland, pro se.
Shameera L. *Carr*, Philadelphia, Pennsylvania, for the agency.

BEFORE

Neil A.. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J, Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115(5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative Judge made no error in law or regulation that affects the outcome, 5 C.F.R. § 1201.115(d),

Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Boards final decision in this matter. 5C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. ...

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

YURI J. STOYANOV, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER DC-531D-06-0228-I-1 DATE: August 3, 2006

Yuri J.Stoyanov, Fulton, Maryland, pro se.
Shameera L. Carr, Philadelphia, Pennsylvania, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115(5 C.F.R § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. In reaching our

decision in this case, we have not considered the appellant's May 18, 2006 submission because it is unauthorized under our regulations and was untimely filed without a showing that it is based on evidence that was not readily available prior to the close of the record on review. *See* 5 C.F.R. § 1201.114(a)-(i); *White v. Social Security Administration,* 76 M.S.P.R. 447, 459 n.8 (1997), *aff'd,* 152 F.3d 948 (Fed. Cir. 1998) (Table); *Payne v. U.S. Postal Service,* 72 M.S.P.R. 646, 649 n.2 (1996). The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management,* 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other

related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedeir.gov/contents .html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

s/
Roberts, Jr.
Clerk of the Board
Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ALEKSANDR J. STOYANOV,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
DC-1221-06-0266-W-1

DATE: August 2, 2006

Aleksandr J. Stoyanov, Fulton, Maryland, pro Se.
Shameera L. Carr, Philadelphia, Pennsylvania, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative

judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The Board has not considered the appellant's reply to the agency's response to the petition for review because the reply was filed on May 27, 2006, after the close of the record on review, and it is not based on evidence that was not readily available before the record closed. *See* S C.F.R. § 1201.114(i). The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel*

Management, 931 F.2d 1544 (Fed. Cir. 1991).
If you need further information~ about your right to appeal this decision to court, you should refer to the federal law that gives you this right, it is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703).vYou may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedeirgov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

F OR THE BOARD

s/
Bentley M. Roberts
Clerk of the Board
Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

YURI J. STOYANOV,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
DC-1221-06-0160-W-1

DATE: March 10, 2006

Yuri J. Stoyanov, Fulton, Maryland, pro se.
David M. Caron, Esquire, West Bethesda, Maryland, for the agency.

BEFORE
Raphael Ben-Ami
Administrative Judge

INITIAL DECISION

The appellant timely filed an individual right of action (IRA) appeal. For the reasons set forth below, the appeal is DISMISSED.

Although the appellant requested a hearing, he was not entitled to one because he did not make nonfrivolous allegations of Board jurisdiction. *See Garcia v. Department of Homeland Security*, No. 04-3442, slip. op. at 38 (Fed. Cir. Feb. 10, 2006). I therefore decided this appeal based on the parties' written submissions*

* The Board may properly consider the agency's evidence, as well as the appellant's, in determining whether the appellant has made nonfrivolous allegations of jurisdiction. *See Dorrall v. Department of the Army*, 301 F.3d 1375, 1380 (Fed. Cir. 2002).

JURISDICTION

Burden of proof/legal standard

The Board's jurisdiction is not plenary, but is limited to those matters over which it has been granted jurisdiction by statute or regulation. *See, e.g., Weber v. Department of the Army, 45* M.S.P.R. 406, 409 (1990). The appellant has the burden of proving by preponderant evidence that the Board has jurisdiction over his appeal. *See 5* C.F.R. § 1201.56(a)(2). Preponderance of the evidence is defined at *5* C.F.R. § 1201.56(c)(2) as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

To establish the Board's jurisdiction over an IRA appeal, the appellant must show that he has exhausted his administrative remedies before the Office of Special Counsel (OSC) and make nonfrivolous allegations that: (I) He engaged

in whistleblowing activity by making a protected disclosure under *5* U.S.C. § 2302(b)(8); i.e., he disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *See Yunus v. Department of Veterans Affairs,* 242 F.3d 1367, 1371 (Fed. Cir. 2001).

The appellant has not established that the Board has jurisdiction over his IRA appeal.

The appellant is employed as a Scientist with the Carderock Division of the agency's Naval Surface Warfare Center in West Bethesda, Maryland. In this IRA appeal, the appellant contends, among other things, that the agency denied him a within-grade increase, proposed his suspension for three days, issued him a Letter of Reprimand, and "imposed discriminatory restrictions" on him in reprisal for his whistleblowing disclosures. *See* Appeal File (AF), Tab 1, page 1 of "Part II Addendum: Agency Personnel Action" attached to Board Appeal Form.

To satisfy the exhaustion requirement of *5* U.S.C. § 1214(a)(3) in an IRA appeal, an appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation which might lead to corrective action. *See Ward v. Merit Systems Protection Board,* 981 F.2d 521, 526 (Fed. Cir. 1992). In an IRA appeal, the Board may consider only those charges of whistleblowing that the appellant asserted before OSC and may not consider any subsequent recharacterization of those allegations (or any additional allegations) put forth by the appellant in his appeal to the Board. *See id.; see also Ellison v. Merit Systems Protection Board,* 7 F.3d 1031, 1036 (Fed. Cir. 1993) (test of the sufficiency of an employee's charges of whistleblowing to OSC are the statements that he makes in the complaint requesting corrective action, not his post hoc characterization

of those statements).

The appellant submitted an October 26, 2005 letter from OSC indicating P that OSC had terminated its inquiry into his allegations. *See* AF, Tab 1, attachment to appeal. The appellant also submitted a copy of his September 23, 2005 complaint to OSC, wherein he claimed that he had been discriminated against and had his suspension proposed in reprisal for his equal employment opportunity (EEO) and whistleblowing activities. *See* id. The appellant did not include in his September 23, 2005 complaint to OSC his allegations regarding the denial of a within-grade increase and issuance of a reprimand, as those actions, by the appellant's own admission, did not occur until November 1 and 22, 2005, respectively. See page 3 of "Part II Addendum: Agency Personnel Action" attached to Board Appeal Form. Those actions therefore are not further considered in this decision.

An proposed suspension is a threatened "personnel action" under *5* U.S.C. § 2302(a)(2)(A). However, "the imposition of discriminatory restrictions," as such, does not constitute a personnel action pursuant to that statute. Moreover, the extant record as provided by the appellant did not show that he engaged in protected whistleblowing activity; i.e., that he made disclosures protected under *5* U.S.C. § 2302(b)(8).
The crux of the appellant's complaint to OSC appeared to be that the agency allegedly took various actions and discriminated against him "in reprisal for participation in protected EEO and Whistleblowing activities." AF, Tab 1, page 1 of "Part 2. Reprisal for Whistleblowing" attached to September 23, 2005 OSC complaint. The appellant did not in his complaint to OSC differentiate between "protected EEO and Whistleblowing activities," however. Rather, he repeatedly claimed that the agency engaged in a pattern of discrimination based on his age and national origin and retaliated against him for participating in the EEO complaint process.

Although reprisal against an individual who files an EEO complaint is a violation of S U.S.C. § 2302(b)(9), as well as a violation of the antidiscrimination statute furnishing the

basis for the underlying complaint, the filing of an EEO complaint does not constitute whistleblowing activity protected under 5 U.S.C. § 2302(b)(8). Thus, the individual who files an EEO complaint and then suffers a personnel action in reprisal has an affirmative defense of a prohibited personnel practice, but not of whistleblowing reprisal. *See Williams v. Department of Defense*, 46 M.S.P.R. 549, *552-54* (1991). For this same reason, charges of reprisal stemming from opposition to discrimination do not qualify for protection under the Whistleblower Protection Act (WPA). *See Von Kelsch v. Department of Labor*, *59* M.S.P.R. 503, 509-10 (1993). The law is settled that disclosures that are limited to EEO matters covered under 5 U.S.C. § 2302(b)(l) and (b)(9) are excluded from coverage under section 2302(b)(8). *See Spruill v Merit Systems Protection Board*, 978 F.2d 679, 690 (Fed.Cir.1992) (filing an EEO complaint is covered by section 2302(b)(9) and thus not covered by section 2302(b)(8)); *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 84 (2001) (purported disclosures that involve alleged discrimination or reprisal for engaging in activities protected by Title VII, even if made outside of the grievance or EBO processes, do not constitute protected whistleblower activity under section 2302(b)(8) because they pertain to matters of discrimination covered by section 2302(b)(1)(A)); *Gonzales v. Department of Housing & Urban Development*, 64 M.S.P.R. 314, 318 (1994) (filing an EEO complaint, testifying at another employee's EEO hearing, and assisting someone in pursuing a complaint are activities that fall within section 2302(b)(9), and thus do not constitute protected disclosures under section 2302(b)(8)); *Peterson v. Department of Transportation*, 54 M.S.P.R. 178, 183 (1992) (employee's allegations of reprisal for allegedly providing information to an EEO investigator regarding sex and racial discrimination did not constitute "whistleblowing" disclosures under section 2302(b)(8)).

Whether an appellant's disclosures are protected whistleblowing is in any event a matter of law. *See Wojcicki v. Department of the Air Force*, 72 M.S.P.R. 628, 634 (1996).

The appellant stated in his September 23, 2005 OSC complaint that the agency's alleged actions violated unspecified laws, rules, and regulations and constituted an abuse of authority. "Abuse of authority" occurs when there is an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons. *See Embree v. Department of the Treasury*, 70 M.S.P.R. 79, 85 (1996). The disclosure of alleged EEO violations does not constitute a disclosure of an abuse of authority. *See Applewhite v. Equal Employment Opportunity Commission*, 94 M.S.P.R. 300, 310 (2003). And, as already noted, the violations of law the appellant alleged appeared to pertain only to matters of discrimination covered under 5 U.S.C. § 2302(b)(l) and (b)(9) and, therefore, are excluded from coverage under section 2302(b)(8). *See id.*

In addition, even assuming for the sake of argument that the appellant made protected whistleblowing disclosures, in order to establish that he had a reasonable belief that those disclosures were protected, he must show that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably have concluded that the actions of the government evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. *See Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000). The appellant's purely subjective belief that his disclosures revealed misbehavior described by section 2302(b)(8), even if shared by other employees, is not sufficient to make such a showing. *See Id.*

Because the appellant made no allegations in his initial appeal submission that, if proven true, could be construed as satisfying the aforementioned standards, I issued an Order to Show Cause, specifically describing the jurisdictional issue and giving the appellant an opportunity to file evidence and argument to prove that his IRA appeal was within the Board's

jurisdiction. *See* AF, Tab 3. The appellant timely responded with a generally non-responsive pleading wherein he reiterated, albeit somewhat more succinctly, some of the allegations made in his previous submission. *See id.*, Tab 8. The agency timely replied to the appellant's response, and asked that this appeal be dismissed for lack of jurisdiction. *See id.*, Tab 13. The appellant thereafter responded to the agency's reply with a submission filed after the close of the record, which I have not considered. *See id.*, Tab 14.

The appellant is advised that the WPA was not designed as a remedy for employee grievances. Rather, the WPA was enacted to protect employees who report genuine infractions of law. *See Frederick v. Department of Justice*, 73 F.3d 349, 353 (Fed. Cir. 1996). To reiterate, the purpose of the WPA is to "root out real wrongdoing" and to protect those who "risk their own personal job security for the advancement of the public good"; it is "not a weapon in arguments over policy or a shield for insubordinate conduct." *Lachance*, 174 F.3d at 1381; *Willis v. Department of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998); *Frederick*, 73 F.3d at 353.

As noted above, the record does not show that the appellant engaged in protected whistleblowing activity. Accordingly, because the appellant has not shown that he made a disclosure protected under 5 U.S.C. § 2302(b)(8), he has failed to establish that the Board has jurisdiction over his IRA appeal and the appeal consequently must be dismissed.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: s/
Raphael Ben-Ami
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

YURI J. STOYANOV,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
DC-531D-06-0228-I-1

DATE: March 22, 2006

Yuri J. Stoyanov, Fulton, Maryland, pro se.
David M. Caron, Esquire, West Bethesda, Maryland, for the agency.

BEFORE
Raphael Ben-Ami
Administrative Judge

INITIAL DECISION

The appellant appealed the agency's alleged decision to deny him a within-grade increase (WIGI). For the reasons set forth below, the appeal is DISMISSED.[1]

Although the appellant requested a hearing, he was not entitled to one because he did not make nonfrivolous allegations of Board jurisdiction. *See Garcia v. Department of Homeland Security*, No. 04-3442, slip. op. at 38 (Fed. Cir. Feb. 10, 2006). I therefore decided this appeal based on the parties' written submissions.[2]

JURISDICTION

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[1] For the purpose of determining that this appeal is properly dismissed for lack of jurisdiction, I do not in this decision address the timeliness of the appeal, but assume arguendo that the appeal was timely filed. *See, e.g., Cassel v. Department of Agriculture*, 72 M.S.P.R. 542, 546 (1996).

[2] The Board may properly consider the agency's evidence, as well as the appellant's, in determining whether the appellant has made nonfrivolous allegations of jurisdiction. *See Dorrall v. Department of the Army*, 301 F.3d 1375, 1380 (Fed. Cir. 2002).

Burden of proof

The appellant bears the burden of establishing by preponderant evidence that the Board has jurisdiction over his appeal. *See* 5 C.F.R. § 1201.56(a)(2). Preponderance of the evidence is defined by regulation as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2). The appellant has not established that the Board has jurisdiction over his appeal.

The Board may hear appeals only from those actions made appealable by some law, rule, or regulation. 5 U.S.C. § 7701(a); 5 C.F.R. § 1201.3. Under chapter 53 of Title 5 of the United States Code, an employee earns a WIGI upon completion of the applicable waiting period so long as, inter alia, he is performing at an acceptable level of competence. 5 U.S.C. § 5335(a); *see Schaefer v. Department of Transportation*, 87 M.S.P.R. 37, 40 (2000). If an agency determines that an employee is not performing at an acceptable level of competence and withholds a WIGI, the employee is entitled to "an opportunity for reconsideration . . . within his agency under uniform procedures prescribed by the Office of Personnel Management [OPM]." 5 U.S.C. § 5335(c). "If the determination [to withhold the WIGI] is affirmed on reconsideration, the employee is entitled to appeal to the Merit Systems Protection Board." *Id.* Thus, the Board can exercise jurisdiction over an appeal from the withholding of a WIGI only if the agency has affirmed its initial decision upon reconsideration or has unreasonably refused to act on a request for reconsideration. *See Schaefer*, M.S.P.R. at 41 (citing *Shaishaa v. Department of the Army*, 58 M.S.P.R. 450, 453 (1992)).

The appellant is employed as a Scientist with the agency's Naval Surface Warfare Center, Carderock Division. He contends that the agency denied him a WIGI on December 8, 2005, in reprisal for his alleged whistleblowing activities.

However, it did not appear from the extant record that the agency had issued the appellant a negative WIGI determination under the procedures prescribed by OPM pursuant to *5* U.S.C. § 5335, that he then requested reconsideration of such a negative agency WIGI determination, and that the agency subsequently sustained such a negative WIGI determination upon reconsideration. Thus, it appeared that the Board might not have jurisdiction over this appeal.

Those matters notwithstanding, the appellant also submitted with this appeal a copy of an Office of Special Counsel (OSC) complaint form signed by the appellant on December 29, 2005, in which he contended, among other things, that he was denied a "within grade promotion" in reprisal for his alleged whistleblowing. Because, as explained above, the complained-of action does not appear to be an "otherwise appealable action" as defined at S C.F.R. § 1209.2(b)(2), an appellant must have first sought corrective action from OSC before filing an individual right of action (IRA) appeal with the Board. *See 5* C.F.R. § 1209.2(b)(1), However, the record did not show that either (a) the Special Counsel notified the appellant that it was terminating its investigation of his allegations, or (b) 120 calendar days had passed since the appellant sought corrective action. Thus, it appeared that the appellant was not yet eligible to file an IRA appeal with the Board regarding his "within grade promotion." *See* S C.F.R. § 1209.5.

Accordingly, I issued an Order to Show Cause, specifically explaining the nature of the jurisdictional issues and the appellant's burden of proof, and providing him with the opportunity to submit evidence and argument to prove that this matter is within the Board's jurisdiction as an otherwise appealable denial of a WIGI or is ripe for adjudication as an IRA appeal. *See* AF, Tab 4. Prior to filing his response to my show-cause order, the appellant submitted a pleading on January 31, 2006, entitled "Opposition to Stay Motion," in which he characterized the instant appeal as an IRA filed on January 11, 2006. *See id.*, Tab 7. The appellant with his Motion

submitted a copy of a January 19, 2006 letter from OSC indicating that OSC had terminated its inquiry into his allegations with respect to "OSC File No MA-06-0733." However, because that letter did not / identify what whistleblowing allegations were considered by OSC with respect to I the referenced OSC file, it was not possible to determine whether OSC terminated its inquiry into the appellant's allegation that he was denied a "within grade promotion" in reprisal for his alleged whistleblowing Indeed, it appeared probable that OSC in fact had not terminated its inquiry into that particular allegation, as the appellant did not even file the complaint in question with OSC until December 29, 2005, or sometime thereafter. Thus, and as noted previously, it appeared that the appellant might not yet be eligible to file an IRA appeal with the Board regarding his "within grade promotion."

The appellant thereafter responded to the show-cause order with a generally non-responsive pleading in which he reiterated claims made earlier in this appeal that the agency had taken various discriminatory and retaliatory actions against him. *See* AF, Tab 9. The appellant further claimed that the Board had jurisdiction over this appeal as an IRA for which he had exhausted his administrative remedy with OSC. As support for that latter contention, the appellant attached to his response another January 19, 2006 letter from OSC referencing OSC File No. MA-06-0733, in which OSC advised that "[b]y letter dated January 5, 2006, we informed you of our preliminary determination not to take action on your complaint."

The agency also responded, and asked that I dismiss this appeal for lack of jurisdiction. *See id.*, Tab 13. The agency submitted documentation with its response showing, among other things, that pay increases for employees of the Naval Surface Warfare Center, Carderock Division, have since 1998 been set mc, accordance with the Navy Personnel Demonstration Project and that, under that system, employees receive no within-grade increases pursuant to S U.S.C. § 5335.

I first find that the OSC complaint signed by the

appellant on December 29, 2005, in fact is not the same complaint closed by OSC on January 19, 2006—i.e., OSC File No. MA-06-0733-because OSC could not possibly have completed its inquiry into the appellant's allegations (that he was denied a "within grade // promotion" in reprisal for his alleged whistleblowing) in what was at most only three business days The appellant in any event has provided nothing in response to my several orders to identify the subject matter of OSC File No. MA-06-0733.~:±1~ Thus, the appellant has not shown that he exhausted his administrative remedy with OSC with respect to his December 29 complaint, and the instant appeal therefore cannot properly be considered a timely IRA appeal concerning that matter.

In addition, it is apparent that the appellant did not receive a negative WIGI determination pursuant to 5 U S C § 5335 Accordingly, the appeal must be dismissed for lack of jurisdiction because the agency has neither unreasonably refused to act on a request for reconsideration nor issued a decision on reconsideration affirming its initial denial of the appellant's WIGI. Absent an appealable adverse action, the Board also lacks jurisdiction over the appellant's concomitant claims of discrimination and reprisal. *See Cruz v. Department of the Navy,* 934 F.2d 1240, 1245-46 (Fed. Cir. 1991) (en banc).

DECISION

The appeal is DISMISSED.

FOR THE BOARD: s/
Raphael Ben-Ami
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

ALEKSANDR J. STOYANOV, Appellant, DOCKET NUMBER DC-1221-06-0266-W-1

v.

DEPARTMENT OF THE NAVY, DATE: March 30, 2006
Agency.

Aleksandr J. Stoyanov, Fulton, Maryland, pro se.
David M. Caron, Esquire, West Bethesda, Maryland, for the agency.

BEFORE
Raphael Ben-Ami
Administrative Judge

INITIAL DECISION

The appellant timely filed an individual right of action (IRA) appeal. For the reasons set forth below, the appeal is DISMISSED.

Although the appellant requested a hearing, he was not entitled to one because he did not make nonfrivolous allegations of Board jurisdiction. *See Garcia v. Department of Homeland Security,* 437 F.3d 1322, 1344 (Fed. Cir. 2006). I therefore decided this appeal based on the parties' written submissions.*

*The Board may properly consider the agency's evidence, as well as the appellant's, in determining whether the appellant has made nonfrivolous allegations of jurisdiction. *See Dorrall* v. *Department of the Army,* 301 F.3d 1375, 1380 (Fed. Cir. 2002).

JURISDICTION

Burden of proof/legal standard

The Board's jurisdiction is not plenary, but is limited to those matters over which it has been granted jurisdiction by statute or regulation. *See, e.g., Weber v. Department of the Army,* 45 M.S.P.R. 406, 409 (1990). The appellant has the

burden of proving by preponderant evidence that the Board has jurisdiction over his appeal. *See 5* C.F.R. § 1201.56(a)(2). Preponderance of the evidence is defined at *5* C.F.R. § *1201.56(c)(2)* as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

To establish the Board's jurisdiction over an IRA appeal, the appellant must show that he has exhausted his administrative remedies before the Office of Special Counsel (OSC) and make nonfrivolous allegations that: (I) He engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8); i.e., he disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by *5* U.S.C. § 2302(a). *See Yunus v. Department of Veterans Affairs,* 242 F.3d 1367, 1371 (Fed. Cir. 2001). The appellant has not established that the Board has jurisdiction over his IRA appeal.

The appellant formerly was employed by the Carderock Division of the agency's Naval Surface Warfare Center in West Bethesda, Maryland. In this IRA appeal, the appellant contends, among other things, that the agency took or proposed to take various personnel actions against his brother, Yuri Stoyanov (a current agency employee), in reprisal for the appellant's alleged whistleblowing. *See* Appeal File (AF), Tab 1, Board Appeal Form and attachments thereto,

To satisfy the exhaustion requirement of *5* U.S.C. § 1214(a)(3) in an IRA appeal, an appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation which might lead to corrective action. *See Ward v. Merit Systems Protection Board,* 981 F.2d 521, 526 (Fed. Cir. 1992). In an IRA appeal, the Board may consider only those charges of whistleblowing

that the appellant asserted before OSC and may not consider any subsequent recharacterization of those allegations (or any additional allegations) put forth by the appellant in his appeal to the Board. *See id.; see also Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993) (test of the sufficiency of an employee's charges of whistleblowing to OSC are the statements that he makes in the complaint requesting corrective action, not his post hoe characterization of those statements).

The appellant submitted a January 20, 2006 letter from OSC indicating that OSC had terminated its inquiry into his allegations. *See* AF, Tab 1, attachment to appeal. Notwithstanding OSC's notification to the appellant in its letter that "[he] may seek corrective action from the MSPB under the provisions of 5 U.S.C. §1214(a)(3) and 1221 . . . ," it appeared that the appellant in fact was not entitled to seek corrective action from the Board because his December 9, 2005 complaint to OSC was limited to allegations that the agency took or proposed to take personnel actions against his brother, and the right to file an IRA appeal is limited to employees, former employees, or applicants for employment who allege that covered personnel actions were taken or proposed to be taken against them in reprisal for their protected whistleblowing. *See* 5 U.S.C. § 1221(a) (a former employee may seek corrective action from the Board "with respect to any personnel action taken, or proposed to be taken, against such . . . former employee, . . . as a result of a prohibited personnel practice described in section 2302(b)(8) . . . ." Emphasis added.).

Accordingly, I issued an Order to Show Cause, specifically describing the jurisdictional issue and giving the appellant an opportunity to file evidence and argument to prove that this IRA appeal was within the Board's jurisdiction. *See* AF, Tab 3. The appellant timely responded with a generally non-responsive pleading wherein he reiterated many of the allegations set forth in his initial submission; i.e., that the agency allegedly took various retaliatory actions and discriminated against him and his brother. *See id.*, Tab 6 The

agency timely replied to the appellant's response, and asked that this appeal be dismissed for lack of jurisdiction because "the actions complained of in [the appellant's] OSC filing were all actions taken against his brother." *See id.*, Tab 9, agency's reply at page 3. The appellant also thereafter responded to the agency's reply. *See id.*, Tab 10.

In neither of his submissions filed in response to my show-cause order does the appellant show that the OSC complaint underlying this IRA appeal was not limited to allegations that the agency took or proposed to take personnel actions against his brother. This appeal consequently must be dismissed as outside the Board's IRA jurisdiction pursuant to *5* U.S.C. § 122 1(a).

DECISION
The appeal is DISMISSED.

FOR THE BOARD: s/
Raphael Ben-Ami
Administrative Judge

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5 U.S.C Section 2302.
Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section -

(A) "personnel action" means - (i) an appointment; (ii) a promotion; (iii) an action under chapter 75 of this title or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of this title; (ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order

psychiatric testing or examination; and (xi) any other significant change in duties, responsibilities, or working conditions; with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action -

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

and

(C) "agency" means an Executive agency and the Government Printing Office, but does not include -

(i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8);

(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the Government Accountability Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -

(1) discriminate for or against any employee or applicant for employment -

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of - (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of

competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of -

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences -

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for

employment because of -

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; or

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the

compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under -

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(e)(1) For the purpose of this section, the term "veterans' preference requirement" means any of the following provisions of law:

(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) Sections 106(f),(!1) 7281(e), and 7802(5) (!1) of title 38.

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans' preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action).

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5 U.S.C Section 1221. (2005)
Individual right of action in certain reprisal cases

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the

Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

(c)(1) Any employee, former employee, or applicant for employment seeking corrective action under subsection (a) may request that the Board order a stay of the personnel action involved.

(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines that such a stay would be appropriate.

(3)(A) The Board shall allow any agency which would be subject to a stay under this subsection to comment to the Board on such stay request.

(B) Except as provided in subparagraph (C), a stay granted under this subsection shall remain in effect for such period as the Board determines to be appropriate.

(C) The Board may modify or dissolve a stay under this subsection at any time, if the Board determines that such a modification or dissolution is appropriate.

(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence.

(2) A subpoena under this subsection may be issued, and shall be enforced, in the same manner as applies in the case of subpoenas under section 1204.

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment

has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that -

(A) the official taking the personnel action knew of the disclosure; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(f)(1) A final order or decision shall be rendered by the Board as soon as practicable after the commencement of any proceeding under this section.

(2) A decision to terminate an investigation under subchapter II may not be considered in any action or other proceeding under this section.

(3) If, based on evidence presented to it under this section, the Merit Systems Protection Board determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215.

(g)(1)(A) If the Board orders corrective action under this section, such corrective action may include -

(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(ii) back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes.

(B) Corrective action shall include attorney's fees and costs as provided for under paragraphs (2) and (3).

(2) If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred.

(3) If an employee, former employee, or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred, regardless of the basis of the decision.

(h)(1) An employee, former employee, or applicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(i) Subsections (a) through (h) shall apply in any proceeding brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(8) is alleged.

(j) In determining the appealability of any case involving an allegation made by an individual under the provisions of this chapter, neither the status of an individual under any retirement system established under a Federal statute nor any election made by such individual under any such system may be taken into account.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

1800 Diagonal Road, Suite 205
Alexandria, VA 22314-2840

Aleksandr J. Stoyanov,
Appellant,

v.

Gordon R. England,
Secretary, NAVY-,
Agency.

MSPB Docket Number
DC-531D-06-0266-W-1

Date: February 14, 2006

RESPONSE TO THE ORDER TO SHOW CAUSE

Dear Judge Raphael Ben-Ami:

On February 1, 2006, you issued Order to Show Cause and to file evidence and argument to prove that my January 25, 2006 appeal to the MSPB is within the Board's jurisdiction. I am submitting evidence and argument as ordered within 15 days of the 2/1/06 Order to Show Cause. In my January 25, 2006 appeal to the MSPB, I already described agency officials' prohibited personnel actions and decisions clearly violating *5 U.S.C 2302(b)(8)(A)(i)* when agency officials violated laws and regulations, failed to enforce the 3/29/05 EEOC Order, and intentionally harmed me and violated my rights. I was harmed and my rights, privileges, terms, conditions and employment opportunities were violated when the agency failed compliance with laws, rules, and regulations. Since 2002, my brother and I have followed the EEO process and filed more than twenty EEO discrimination complaints each, however the EEO process was corrupted and the agency officials continued intentional discrimination violating laws and regulations. The EEOC administrative judge found that agency officials committed unlawful discrimination against me, and the agency was aware of the repeated incidents of intentional discrimination, but deliberately failed to comply with Navy policy of zero

tolerance to discrimination, properly prosecute, discipline or subject to any sanctions the responsible officials involved in violations of laws, regulations, and intentional reprisals against me.

For more than three years Mr. Jebsen in conspiracy with subordinates and agency officials intentionally violated laws, willfully violated my brother's and my rights, and deliberately obstructed official process on our complaints to EEOC and OSC. To deny my brother and me promotions to ND-5 positions, Mr. Jebsen threatened and had taken prohibited personnel actions for disclosing information about violations of laws, and escalated intentional discrimination and retaliations against us. See enclosed *Affidavits of A. J Stoyanov and Y. J. Stoyanov.* In addition, Mr. Jebsen in conspiracy with his subordinates and other agency officials retaliated against my brother in September 2005, as soon as I specifically requested the agency administration to enforce compliance with Navy policy of zero tolerance to discrimination and the March 2005 EEO Commission Order in August and September 2005. In violation of laws, Mr. Jebsen in conspiracy with agency officials retaliated against my brother by using threats of disciplinary action, fraudulently lowering performance appraisal, denying within-grade increase pay demo points, and issuing the Letter of Reprimand on fabricated charges with intentional threats and discriminatory restriction in reprisal for the Whistleblowing activities.

Moreover, agency officials refused to comply with the March 29, 2005 EEO Commission Order to take appropriate disciplinary action against the responsible management officials committing egregious discrimination and fraud, ignored Navy policy of zero tolerance to discrimination and instead intentionally escalated retaliations for prior EEO and Whistleblowing activities and committed prohibited personnel actions described in my IRA appeals to MSPB. As stated in my current IRA, the EEOC Administrative Judge found that agency officials committed

unlawful discrimination against me in the first EEOC case completed in 2003. The EEOC Judge found intentional discrimination in reprisal for prior EEO activity in my brother's Dr. Yuri Stoyanov and my first EEOC case. In 2004, the EEOC Administrative Judge found again that agency officials committed intentional discrimination in reprisal for prior protected activity in the second EEOC case. In 2005, the EEO Commission Office of Federal Operation (EEOC-OFO) affirmed AJ's finding that agency officials committed discrimination and on March 29, 2005 issued Order directing the agency to take disciplinary measures against the responsible management officials who committed discrimination. Note that since June 2002, Mr. G. Jebsen was the third level supervisor to my brother and me intentionally escalating discrimination in conspiracy with subordinate management officials and agency representative Mr. Caron. To cover-up discrimination and fraud, Mr. Jebsen committed multiple perjuries and was repeatedly impeached while testifying during the EEOC hearings in 2003 and 2004. My brother and I have filed formal EEO discrimination complaints against Mr. Jebsen and reported intentional violations of laws, fraud, and retaliations for participation in EEO and Whistleblowing activities to US Office of Special Counsel in 2002, 2003 and 2005.

I believe that the Order to Show Cause misconstrued and did not take into consideration crucial evidence in the record that I was harmed and in my IRA appeal I specifically stated that "Captain Behrle in conspiracy with Mr. Jebsen and Mr. Caron violated Navy policy and the 3/29/05 EEOC-OFO Order to take disciplinary measures against the responsible management officials who committed unlawful discrimination against me." I have specifically explained in my IRA that I was harmed and Mr. Jebsen in conspiracy with agency officials maliciously and intentionally abused supervisory position and disciplinary process to retaliate against me and intimidate my brother and me from asserting rights in the EEO process against unlawful employment

practices and actions based on lies, fraud and violations of Federal laws and regulations.

Agency officials refused to comply with the March 29, 2005 EEO Commission Order to take appropriate disciplinary action against the responsible management officials, ignored Navy policy of zero tolerance to discrimination and instead intentionally escalated retaliations against me and my brother for Whistleblowing activities and committed prohibited personnel actions described in my IRA appeal.

The Order to Show Cause further misconstrued my status as "former employee" contrary to the fact that I am a current Carderock Division employee in non-pay status because I did not resign from my position, but was unlawfully removed from my position in October/November 2003 on fabricated charges in reprisal for reporting violations of laws and participation in EEO and Whistleblowing activities since 2002. Accordingly, "in the eyes of the law" I remain in service; see *Dilley v. Alexander, 627 F.2d 407, 411 (1980).* In fact, since June 2005 and October 2005, I filed civil actions in the US District Court seeking compensation for damages, reinstatement to the pay status because of unlawful removal from the Scientist position and intentional violations of my rights by the agency officials violating laws, regulations, and Navy policy of zero tolerance to discrimination. Moreover, in my appeal to OSC, I stated in the Complaint of Prohibited Personnel Practices on page 8: "The Department of the Navy officials acted willfully and in reckless disregard of my rights in reprisal for my participation in EEO discrimination complaint and Whistleblowing activities and violated my civil rights and Federal laws clearly established and well-settled including the civil service laws as set in 5 USC 2302 that forbid personnel actions based on the prohibited personnel practices." It is clear that I suffered harm of prohibited personnel practices identified in 5 U.S.C. 2302 (a) (2) (A) (i.

ii, iii, v, vi, ix, xi), 2302 (b) (1, 2, 4, 6, 8, 9, 10, and 12) as established in my appeals to the OSC and MSPB.

The January 25, 2006 IRA is within Board's jurisdiction and I have a right to a hearing on the merits of my claims. See *Spencer v. Department of the Navy, 327 F.3d, 1354, 1356 (Fed. Cir. 2003), see also Rusin, 92 M.S.P. B. 298, PHP 20 (2002).* The Board has jurisdiction over my IRA appeal because I exhausted my administrative remedies before OSC and made non-frivolous allegation that I engaged in EEO and Whistleblowing activities by making protected disclosures under 5 US.C. 2302 (b)(1, 2, 4, 6, 8, 9, 10, and 12), and the disclosures were contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, a personnel action as defined by U.S. C. 2302(a)(2)(A). *Yunus, 242 F.3d at 1371-72. Rusin, 92 M.S.P. B. 298, PHP 12(2002).* As the third level supervisor and the department head of Code 70, Mr. Jebsen in conspiracy with agency officials intentionally escalated discrimination and retaliated against my brother and me. In August and September 2005, I informed agency administration of the Carderock Division Captain Behrle and the administration of the Naval Surface Warfare Center Admiral Macy about agency officials' failure to comply with the EEOC-OFO Order and Navy policy of zero tolerance to unlawful discrimination. I also disclosed agency officials' violations of laws in my appeals to the OSC. Clearly, the disclosures of violations of laws and regulations were within short period of prohibited personnel actions in retaliation for my participation in EEO and Whistleblowing activities. Accordingly, I engaged in protected Whistleblowing and Whistleblowing was a contributing factor to the agency officials' prohibited personnel actions against my brother and me that identify claims of personnel actions upon which reprisal for Whistleblowing was stated.

Below are the claims identified in my January 25, 2006 Appeal that was submitted to the MSPB describing prohibited personnel actions and raising issues of intentional

retaliations against the Appellant in reprisal for participation in EEO and Whistleblowing activities. In my Individual Right of Action (IRA) appeal to the MSPB, I stated claims describing prohibited personnel actions by the agency officials as follows:

1) Captain Behrle in conspiracy with Mr. Jebsen and Mr. Caron violated Navy policy and the 3/29/05 EEOC-OFO Order to take disciplinary measures against the responsible management officials who committed unlawful discrimination against me.
2) On September 7, 2005, as a result of reprisal for my participation in prior EEO and Whistleblowing activities. my brother was threatened with suspension from work and issued Notice of Proposed Suspension in violation of laws and regulations.
3) On November 1, 2005, as a result of reprisal for my participation in prior EEO and Whistleblowing activities, my brother was given intentionally false evaluation of job performance
4) On November 14, 2005, as a result of reprisal for my participation in prior EEO and Whistleblowing activities. my brother was denied incentive pay within-grade increase.
5) On November 22, 2005, as a result of reprisal for my participation in prior EEO and Whistleblowing activities Mr. Jebsen issued to my brother Letter of Reprimand based on fraud and violations of laws.

I reviewed the Board's statutory mission and established that all my claims are within the Board's mission to protect the Appellant against prohibited personnel practices and to ensure adequate protection for the Appellant's brother against abuses by agency management intentionally violating laws and regulations to retaliate against me. The record shows that the US Merit System Protection Board carries out its statutory mission by adjudicating employee appeals of personnel actions over which the Board has jurisdiction, such as my IRA complaints filed under the Whistleblower Protection Act. It is clear that

I participated in the protected activity and the plain text of the anti-retaliation provisions recognize that there can be no doubt that an employer who retaliates against the relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected right. "To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB v. Advertisers Mfg. Co. 823 F.2d 1086, 1088 (1987).* Allowing employers to retaliate via family, therefore, would conflict with the overall purpose of the anti-retaliation provisions, which are intended to promote the reporting, investigation, and correction of violations of law, rule, or regulation and abuse of authority in the workplace. Indeed, the right to file an IRA appeal cannot be narrowly construed. In fact, Board's jurisdiction is established by the plain text of 5 U.S.C. 2302 (b) (8, 9, 10): "take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee... because (A) any disclosure of information by an employee ... which the employee ... reasonably believes evidences (i) a violation of any law, rules, or regulation ...(A) the exercise or any appeal, complaint, or grievance right granted by any law, rule, or regulation; (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A); (C) Cooperating with or disclosing information to... the Special Counsel,... on the bases of conduct which does not adversely affect the performance of the employee ... or the performance of others;..." (emphasis added) does not limit a cause of action to the particular employee that engaged in protected activity. Thus, I have the right to include prohibited personnel actions against my brother and co-worker because tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their rights.

Furthermore, similar provision contains language found in section 8(a) (1) of the NLRA (National Labor Relations Board), 29 U.S.C. S 158 (a) (1), which makes it

unfair labor practice for an employer "to interfere with. restrain, or coerce employees" in exercising their rights guaranteed under the Act and the courts have recognized that Section 8 (a) (1) prohibits unlawful personnel action against a close relative of an employee who engages in activity protected by the NLRA, see, e.g., *Tasty Baking Co. v. NLRB 254 F. 3d 114, 127-28 (2001).* Accordingly, all of the above claims are within the jurisdiction and statutory mission of the Board and thus, should be accepted for the hearing.

As additional means of showing illegal retaliation for Whistleblowing activity under the Whistleblower Protection Act of 1989 (Public Law 101-12), I also established in my appeals to the OSC and MSPB that agency officials retaliated against me due to the fact of "discriminat [ion] for or against any employee..." because such individual has engaged in protected activity. See 5 U.S.C. 2302 (b) (1) (A, B, C). "Discriminat [tion]" refers to the practice of making a decision based on a certain criterion, and therefore focuses on the decision-maker's subjective intent. What follows the "Discriminat [tion]" specifies the criterion that the agency is prohibited from using as a basis for decision-making. The laws, therefore, focus on the employer's subjective reasons for taking adverse actions against an employee, so it matters not whether the reasons behind the employer's discriminatory animus are actually correct (in fact, they were based on intentional misrepresentations and fraud) as a factual matter. What is relevant is that an employee was treated worse than he otherwise would have been for reasons prohibited by the statute. I have established the pattern of intentional discrimination against my brother and me and that Captain Behrle in conspiracy with Mr. Jebsen and subordinates intentionally escalated discrimination using prohibited personnel practice to take or fail to take, or threaten to take or fail to take a personnel action and violated Federal laws and Navy policy.

Since 2002, the agency officials were aware that I filed EEO discrimination complaints, appeals to OSC, and

appeals to the higher authority to restore compliance with laws and enforce Navy policy of zero tolerance to discrimination. I established that I had engaged in protected Whistleblowing activity and made disclosures protected under Whistleblower Protection Act. In my Complaint of Prohibited Personnel Practices of December 9, 2005 [OSC File N0. MA-06-0603], I established by direct evidence Mr. Jebsen's intent to continue intentional discrimination against my brother and me; see p. 3 and following pages in the Complaint of Prohibited Personnel Practices. Mr. Jebsen in conspiracy with subordinates willfully harmed me and intentionally escalated prohibited personnel practices against me in retaliation for my brother's and my participation in Whistleblowing activities in order to intimidate my brother and me from asserting rights and further participation in the EEO discrimination complaint process and Whistleblowing activities. Undisputed evidence in the record and factual allegations showed that the agency officials responsible for these personnel actions against my brother and me were aware of the Appellants' disclosures and acted within such time that a reasonable person would find that these disclosures contributed to the prohibited personnel practice. The agency administration was aware of the Appellants' disclosures and in conspiracy with Mr. Jebsen and his subordinates acted within such time that a reasonable person would find that the disclosures contributed to the prohibited personnel actions in violation of laws, rules, and regulations. In addition, I specifically identified evidence of "violation of law, rule, or regulation" and "abuse of authority" on page 6 of the OSC Form-11 and explained the disclosures in boxes A, B, and C as required. Furthermore, in Part 2. REPPRISAL FOR WHISTLEBLOWING specifically addressed agency officials' violations of laws, rules and regulations. For the forgoing reasons, I established Board's jurisdiction to file an IRA appeal and I have a right to a hearing on the merits of my claims.

Direct evidence in the record shows that my claims were filed under the Whistleblower Protection Act within the Board's jurisdiction because agency officials were aware about my protected activity and intentionally harmed me escalating prohibited personnel actions against me. Mr. Jebsen in conspiracy with subordinates threatened to take and in fact had taken personnel actions on fabricated charges against my brother and me causing severe harm, pain, mental anguish and economic damages and losses, including, but not limited to loss of benefits, opportunities for promotion in employment, an appointment, a reinstatement, a restoration. discouragement, embarrassment, emotional distress, severe anxiety, stress, and frustration, indignity and reduced quality of life. In addition, the Notice of Proposed Suspension on fabricated charges, intentionally false evaluation of my brother's performance, denial of within-grade increase, the Letter of Reprimand and additional threats and discriminatory restrictions imposed against my brother were based on fabricated charges and fraud to harm me and my brother in reprisal for my brother's and my appeals to the higher authority to step in and take immediate measures to restore compliance with laws and enforce Navy policy of zero tolerance to discrimination.

Wherefore, for the forgoing reasons I established by preponderance of evidence in the record that the Board has jurisdiction over my IRA appeal and respectfully request to accept all Appellant's claims for the hearing.

Respectfully Submitted,
s/
Aleksandr Stoyanov
7560 Pindell School Road
Fulton, MD 20759-5700

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

1800 Diagonal Road, Suite 205
Alexandria, VA 22314-2840

Yuri J. Stoyanov,
Appellant,

MSPB Docket Number
DC-531D-06-0228-I-1

v.

Gordon R. England,
Secretary, NAVY-,
Agency.

Date: February 4, 2006

RESPONSE TO THE ORDER TO SHOW CAUSE

Dear Judge Raphael Ben-Ami:

On January 24, 2006, you issued Order to Show Cause and to file evidence and argument to prove that my January 11, 2006 appeal to the MSPB is within the Board's jurisdiction. In my January 11, 2006 appeal, I described agency officials' prohibited personnel actions and decisions clearly violating *5 U.S.C 2302(b)(8)(A)(i)* when on December 8, 2005, Mr. Jebsen in conspiracy with his subordinates and other agency officials retaliated against me by denying within-grade increase pay demo points for 2005 performance period. Mr. Jebsen in conspiracy with his subordinates intentionally denied the continuous/within grade salary increase and the bonus pay demo points by fraudulently lowering performance appraisal on November 1, 2005 and issuing the Letter of Reprimand on November 22, 2005, in retaliation for Whistleblowing activities after I filed disclosures/complaints with US Office of Special Counsel of September 2005 and June 2002. I disclosed in my appeals to the OSC and the MSPB violations of laws and regulations and the September 7, 2005 fraudulent Notice of Proposed Suspension that was issued on fabricated charges in reprisal for my brother's and my Whistleblowing activities since 2002. In August and September 2005, specific requests to

the agency administration were made to enforce compliance with the March 2005 EEO Commission Order and Navy policy of zero tolerance to discrimination.

As I informed you earlier and in my current IRA, the EEOC Administrative Judge found that agency officials committed unlawful discrimination in the first EEOC case completed in 2003, with regard to my brother's Dr. Aleksandr Stoyanov and my prior protected activities. In 2004, the EEOC Administrative Judge found again that agency officials committed discrimination in the second EEOC case. In 2005, the EEO Commission Office of Federal Operation (EEEOC-OFO) affirmed AJ's finding that agency officials committed discrimination and on March 29, 2005 issued Order directing the agency to take disciplinary measures against the responsible management officials who committed discrimination. Note that since June 2002, Mr. G. Jebsen was the third level supervisor to my brother and me. To cover-up discrimination and fraud, Mr. Jebsen committed multiple perjuries and was repeatedly impeached while testifying during the EEOC hearings in 2003 and 2004. My brother and I have filed over twenty formal discrimination complaints against Mr. Jebsen and reported intentional violations of laws, fraud, and retaliations for participation in EEO and Whistleblowing activities to US Office of Special Counsel in 2002, 2003 and 2005. Agency officials refused to comply with the March 29, 2005 EEO Commission Order to take appropriate disciplinary action against the responsible management officials, ignored Navy policy of zero tolerance to discrimination and instead intentionally escalated retaliations for Whistleblowing activities and committed prohibited personnel actions described in my IRA appeals to MSPB of December 9, 2005 and January 11, 2006. Because agency officials refused to enforce EEOC-OFO Order of March 29, 2005 and violated laws, Mr. Jebsen, Mr. Wilson, Mr. Caron and others were named Defendants in Federal District Court cases my brother and I filed since June 2005.

With regard to my December 9, 2005 IRA appeal to MSPB, I filed my response to the Order to Show Cause on December 30, 2005 and proved by preponderance of evidence in the record that agency officials actions were in reprisal for my whistleblowing activities and that the Board has jurisdiction over my IRA. The January 11, 2006 IRA is also within Board jurisdiction and I have a right to a hearing on the merits of my claims. *Spencer v. Department of the Navy, 327 F.3d, 1354, 1356 (Fed. Cir. 2003), see also Rusin, 92 M.S.P. B. 298, PHP 20 (2002)*. The Board has jurisdiction over my IRA appeal because I exhausted my administrative remedies before OSC and made non-frivolous allegation that I engaged in EEO and whistleblowing activity by making a protected disclosure under 5 US.C. 2302 (b)(8), and the disclosure was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, a personnel action as defined by U.S. C. 2302(a)(2)(A). *Yunus, 242 F.3d at 1371-72. Rusin, 92 M.S.P. B. 298, PHP 12(2002).* As the third level supervisor and the department head of Code 70, Mr. Jebsen in conspiracy with agency officials intentionally escalated discrimination and retaliated against me by lowering my performance appraisal, denying all demo pay points and issuing a Letter of Reprimand, after proposing to suspend me from work on fabricated charges with the first-level supervisor Mr. Crock on September 7, 2005 in reprisal for my participation in prior EEO and Whistleblowing activities after my brother emailed and faxed appeals to RADM Macy requesting compliance with the EEO Commission Order and Navy policy of zero tolerance to discrimination. Withholding of within-grade increase continuing incentive pay demo points was "a decision concerning pay" subjecting me to a personnel action upon which a claim of reprisal for Whistleblowing was based. See 5 U.S.C. 2302(a)(2)(A)(ix), 2302(b)(8), 7701(c)(2)(B). In August and September 2005 my brother Dr. Aleksandr Stoyanov informed agency administration of the Carderock Division Captain Behrle and the administration of the Naval

Surface Warfare Center Admiral Macy about agency officials' failure to comply with the EEOC-OFO Order and Navy policy of zero tolerance to unlawful discrimination. Clearly, the disclosures of violations of laws and regulations were within short period of prohibited personnel actions in retaliation for my participation in Whistleblowing activities. Accordingly, I engaged in protected Whistleblowing, the claims identify personnel actions upon which reprisal for Whistleblowing was stated, and Whistleblowing was a contributing factor to the agency officials' prohibited personnel actions against me.

Below are the claims identified in my January 11, 2006 and December 9, 2005 Appeals that were submitted to the MSPB describing prohibited personnel actions and raising issues of intentional retaliations against the Appellant in reprisal for participation in EEO and Whistleblowing activities. In my Individual Right of Action (IRA) appeals to the MSPB, I stated claims describing prohibited personnel actions by the agency officials as follows:

1) On September 7, 2005, as a result of reprisal for participation in prior EEO and Whistleblowing activities, the first-level supervisor Mr. B. Crock threatened to suspend me from work and issued Notice of Proposed Suspension violating laws and regulations. (This claim was appealed to the MSPB on December 9, 2005)
2) On November 1, 2005, first-level supervisor Mr. B. Crock made intentionally false evaluation of my performance in reprisal for prior EEO and Whistleblowing activities. (This claim was appealed the MSPB on December 9, 2005, however on December 14, 2005 Mr. E. Hawthorne, Paralegal Specialist at MSPB, informed me that the claim was filed too early because agency has not issued reconsideration or final decision.)
3) On November 22, 2005, Mr. Jebsen issued Letter of Reprimand based on fraud and violations of laws in reprisal for my prior EEO and Whistleblowing activities. (This claim was appealed the MSPB on December 9, 2005,

however on December 14, 2005 Mr. E. Hawthorne, *Paralegal Specialist at MSPB, informed me that the claim* was filed too early because agency has not issued reconsideration or final decision.)

4) I was denied within-grade promotion. (This claim was appealed the MSPB on December 9, 2005, however on December 14, 2005 Mr. E. Hawthorne, Paralegal Specialist at MSPB, informed me that the claim was filed too early because agency has not issued reconsideration or final decision.) To my December 13, 2005 appeal to Mr. Jebsen to reconsider, Jebsen replied on December 19, 2005 informing me that his subordinate Mr. Wilson's December 8, 2005 denial of my appeal to reconsider intentionally false evaluation of my performance and assignment within grade (ND-4 band) increase and bonus demo points was final decision.

With Your Honor's Acknowledgement Order of December 15, 2005, I received a notice from Mr. E. Hawthorne, MSPB Paralegal Specialist informing me that the Claim 4) of denied within-grade increase (increase in salary within band-ND-4) was not accepted because it "was filed too early" and "agency has not issued a reconsideration or final decision. 5 CFR § 513.410." I was advised to re-file appeal within 30 calendar days after the reconsideration date or final decision is issued. On December 19, Mr. Jebsen informed me that the decision for denied all demo pay points, the continuous within-grade promotion and the bonus demo points was final. On December 29, 2005 I filed complaint with US Office of Special Counsel about prohibited personnel actions and on January 19, 2006 the OSC notified me on these issues that I have a right to seek corrective action from the MSPB on my OSC File N0. MA-06-0733 (**Attachment A**). Therefore, I have exhausted my administrative remedies before OSC and my January 11, 2006 IRA is within Board jurisdiction and, accordingly, I respectfully request to consolidate all my claims and Claim 4) of denied within-grade promotion with the current appeal

of December 9, 2006, the MSPB docket number DC-1221-*06-0160-W-1*

I reviewed the Board's statutory mission and believe that all four claims are within the Board's mission to protect the Appellant against prohibited personnel practices and to ensure adequate protection for the Appellant against abuses by agency management. The record shows that the US Merit System Protection Board carries out its statutory mission by adjudicating employee appeals of personnel actions over which the Board has jurisdiction, such as suspensions, denial within-grade promotion and complaints filed under the Whistleblower Protection Act. Accordingly, all of the above claims are within the statutory mission of the Board and should be accepted for the hearing.

Direct evidence in the record shows that all my claims are within the Board's jurisdiction. These claims were filed under the Whistleblower Protection Act because agency officials were aware about my protected activity and intentionally escalated prohibited personnel practice by threatening to take and in fact taking personnel actions on fabricated charges causing severe harm and economic damages and losses, including, but not limited to loss of within grade increase continuing pay demo points and opportunities for employment, discouragement, embarrassment, emotional distress, severe anxiety, stress and frustration, indignity and reduced quality of life. The Notice of Proposed Suspension, intentionally false evaluation of my performance, denial of within-grade increase, the Letter of Reprimand and additional discriminatory restrictions imposed against me were based on fabricated charges and fraud in reprisal for my brother's and my appeals to the higher authority to step in and take immediate measures to restore compliance with laws and enforce Navy policy of zero tolerance to discrimination. Since 2002, the agency officials were aware that I filed EEO discrimination complaints, appeals to OSC, and to the higher authority to restore compliance with laws and enforce Navy policy of

zero tolerance to discrimination established that I had been engaged in protected Whistleblowing activity and made disclosures protected under Whistleblower Protection Act. In my complaints of Prohibited Personnel Practice of September 23, 2005 to the OSC [OSC File No. MA-05-2857, MA 06-0092] and December 29, 2005 [OSC File N0. MA-06-0733], I specifically identified evidence of "violation of law, rule, or regulation" and "abuse of authority" on page 6 of the OSC Form-11 and explained the disclosures in boxes A, B, and C as required. In addition, I have enclosed addendum (Part 2. REPPRISAL FOR WHISTLEBLOWING) specifically addressing agency officials' violations of laws, rules and regulations. Furthermore, in my complaints of Prohibited Personnel Practice to the OSC of September and December 2005, provided to MSPB as enclosures to these IRAs, I also provided details of the actions reported to OSC on page 3 and in addendum (Part 1: Prohibited Personnel Practices).

In the Order to Show Cause you have stated that "It does not appear that the agency issued you a negative WIGI determination under the procedures prescribed by OPM pursuant to 5 U. S. C. 5335, that you requested reconsideration of such a negative agency WIGI determination and that the agency subsequently sustained such a negative WIGI determination upon reconsideration." The facts in the record established that agency issued me a negative determination "concerning my pay" in reprisal for my whistleblowing activities and denied all demo pay points: continuous pay increase (within grade increase) and bonus pay increase as identified by DEMO. On November 1, 2005 the agency issued false evaluation of my performance in reprisal for my participation in Whistleblowing activities and subsequently denied continuous and bonus pay increase as the negative WIGI determination and after I requested reconsideration of such a negative determination in November and December, following the prescribed procedure, Mr. Jebsen in conspiracy with his subordinates

denied reconsideration on December 19, 2005, as was fully documented in my appeal.

The fact that the first level supervisor Mr. Crock lowered my performance appraisal in retaliation for Whistleblowing activity is undisputed evidence in the record establishing Board's jurisdiction over the IRA appeal regardless of the name DEMO or OPM 5 U.S.C. 5335 denial of all demo pay points for Fiscal Year 2005. Regardless of the name used in denying within grade increase or continuous demo pay points is "a decision concerning pay" and therefore subjected appellant to prohibited personnel action upon which reprisal for Whistleblowing was based. In fact, continuous demo pay points constitute within grade increase (or within band increase) denied to me following the November 1, 2005 intentionally false performance appraisal. See attached to January 11, 2006 IRA copy of the NSWC Personnel Demonstration Project Performance Evaluation and Incentive Pay Summary. Mr. Crock's hand written negative appraisal on November 1, 2005 was the agency's decision to lower my performance appraisal, which is a covered personnel action under 5 U.S.C. 2302(a)(2)(A). See *Larson v. Department of the Army, 260 F.3d. 1350, 1356 (Fed. Cir. 2001)*. Moreover, the agency officials responsible for issuing performance appraisal were aware of my disclosures and acted within such a time that a reasonable person could find that the disclosures contributed to the personnel action. See *Scott v. Department of Justice, 69 M.S.P.B. 211, 238 (1995)*. Thus, since I made a non-frivolous allegations of violations of laws and my disclosures were protected under 5 U.S.C. 2302(b)(8), I have established the Board's jurisdiction. Applying this analysis, any reasonable mind can find that I have made jurisdictional showing. First, I sought corrective action from and exhausted administrative remedies before OSC. It is also clear that I made a non-frivolous allegation that the agency's decision to lower my performance appraisal score is a covered personnel action under 5 U.S.C. 2302(a)(2)(A).

Section 5 U.S.C. 2302(a)(2)(A) protects disclosures which an employee reasonably believes evidence "(i) a violation of any law, rule or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health." Moreover, the agency officials responsible for issuing my performance appraisal, namely Mr. G. Jebsen, Mr. K. Wilson and Mr. B. Crock were aware of the disclosures and acted within such a time that a reasonable person could find that the disclosures contributed to the personnel action.

In my appeal to the OSC, I reported violations of laws, rules, and abuse of authority by the agency officials in reprisal for my participation in EEO and Whistleblowing activities since 2002. The first OSC disclosure/complaint I filed in June 2002, my second OSC disclosure/complaint I filed in September 2005 and my December 2005 OSC disclosure/complaint was filed with OSC on 12/29/05 after I received 12/14/06 Acknowledgment and Order from MSBP with Mr. W. Hawthorne's letter. As I explained above, Mr. E. Hawthorne, Paralegal Specialist informed me that the Claim 4) of denied within-grade promotion was not accepted because it "was filed too early" and he advised to re-file appeal within 30 calendar days after the date the reconsideration or final decision was issued, or 30 days after the date of receipt of the agency's decision, whichever is later. Similarly, Claim 2 of the prohibited personnel practice by the first-level supervisor Mr. B. Crock making intentionally false evaluation of my performance on November 1, 2005, and Claim 3 with regard to the November 22, 2005 Letter of Reprimand fall within prohibited personnel practice considered by the OSC specifically authorizing me to file a request for corrective action with the MSPB within 65 days after the receipt of the OSC's October 26, 2005 letter.

The October 26, 2005 OSC letter specifically stated that because I was a victim of the prohibited personnel

practice described in *5 USC 2302(b)(8)*, commonly called reprisal for whistleblowing, I may have a right to seek corrective action and I should submit the copy of the OSC's October 26, 2005 letter to the MSPB as part of my appeal. The OSC's October 26, 2005 letter was in response to my September 23, 2005 complaint of Prohibited Personnel Practice filled out in the Form OSC-11 as Ms. C. McMullen. Chief of Disclosure Unit advised me in her OSC letter of September 16, 2005 (**Attachment B**, attached to this Response to the Order to Show Cause), after I reported violations of laws, rules, and abuse of authority by agency officials of the Carderock Division, NSWC. Your Honor further stated that "it does not appear that either (a) the Special Counsel notified you that it was terminating its investigation of your allegations, or (b) 120 calendar days have passed since you sought corrective action." The OSC's January 19, 2006 letter (**Attachment A**) was in response to my December 29, 2005 complaint of Prohibited Personnel Practice filled out in the Form OSC-11 the OSC File No. MA-06-0733, which is ripe for the Board to adjudicate my appeal. *See Brooks v. department of Homeland Security, 95 MSPB 464, 8 (2004).* The OSC notified me that I have a right to seek corrective action from MSPB on 1/19/06 and 10/26/05, and therefore the Board has jurisdiction over my IRA appeals with the Board and all my claims currently before Your Honor.

Recent Board Decisions of July 27, 2005 *Ng v. Department of the Treasury, MSPB Docket N0. SG-1221-04-0495-W-1* and August 4, 2004 in *Gimes v. Department of the Navy, BN-1221-03-0163-W-1*, support Appellant's right to a hearing of the four claims under Whistleblower Protection Act before the MSPB because of prohibited personnel actions against Appellant in reprisal for Whistleblowing activity. In addition, any doubt or ambiguity as to whether the Appellant made a non-frivolous allegation should be resolved in favor of the Appellant affording the Appellant a hearing. Furthermore, the July 27, 2005 and the August 4, 2004

Board's decisions set out the test for the Board jurisdiction on Appellant's appeal. The Board must conclude that the Appellant is entitled to a hearing. In fact, I made a non-frivolous allegations that my prior disclosures of violations of laws, fraud with promotions, and the involuntary transfer were a contributing factor in several personnel actions since 2002, such as involuntary transfer in April 2002 and another involuntary transfer in October 2003, imposed discriminatory restrictions and requirements intentionally violating Appellant's rights, threats of disciplinary actions, intentional lowing of performance appraisal to deny within grade increase demo pay points, issuing of the Letter of Reprimand in November 22, 2005 with additional discriminatory restrictions, and threats of further disciplinary actions clearly established prohibited personnel practice and that violations of law have occurred. Thus, pursuant to the Board's decisions of July 27, 2005 *Ng v. Department of the Treasury, MSPB Docket N0. SG-1221-04-0495-W-1* and of August 4, 2004 in *Gimes v. Department of the Navy, BN-1221-03-0163-W-1*, all claims in the instant case are in accordance with the Whistleblower Protection Act and afford Appellant a hearing because the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action.

Undisputed evidence in the record and factual allegations showed that the agency officials responsible for these personnel actions were aware of the Appellant's disclosures and acted within such time that a reasonable person would find that these disclosures contributed to the prohibited personnel practice. The agency administration in conspiracy with Mr. Jebsen and his subordinates were responsible for these personnel actions and were aware of the Appellant's disclosures and acted within such time that a reasonable person would find that the disclosures contributed to the prohibited personnel actions in violation of laws. Mr. Jebsen in conspiracy with subordinates willfully and intentionally escalated prohibited personnel practice against me in retaliation for my brother's and my participation in

Whistleblowing activities in order to intimidate my brother and me from asserting rights and further participation in the EEO discrimination complaint process and Whistleblowing activities.

Wherefore, I respectfully request to accept all Appellant's claims for the hearing and protect me against unlawful personnel actions by the agency officials.

Respectfully Submitted,
s/
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